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Southern Pacific Railroad Company, et al., Appellants,
vs.
The United States, Appellee.

No. 105.

The United States, Appellant,
vs.
Southern Pacific Railroad Company, et al., Appellees.

No. 185.

Appeal and Cross Appeal from the United States Circuit Court of Appeals, Ninth Circuit.

Brief for United States.

JOSEPH H. CHOATE,
Special U. S. Attorney.

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SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1900.

Nos. 152 (185)

SOUTHERN PACIFIC RAILROAD COMPANY, et al., *Appellants,* vs. THE UNITED STATES, *Appellee.*	*No. 152.*
THE UNITED STATES, *Appellant,* vs. SOUTHERN PACIFIC RAILROAD COMPANY, et al., *Appellees.*	*No. 185.*

Appeal and Cross Appeal from the United States Circuit Court of Appeals, Ninth Circuit.

Brief for United States.

Statement of the Case.

This suit in equity represents a continuation of the controversy between the United States and the Southern Pacific Railroad Company, concerning the title of

the United States to the forfeited Atlantic and Pacific grant in California, the title to which, as the Government contends, has been in former suits adjudged in favor of the United States.

Like the former cases this suit is brought to quiet the title of the United States, and to vacate patents so far as erroneously issued by the Interior Department, and for general equitable relief.

The rights of the United States to the forfeited Atlantic and Pacific grant, have been so often before the courts and so thoroughly considered, it is believed that a comparison of the issues presented in the present appeals with the issues and adjudications in the former cases, will show to the court that not only are the questions, claims, and rights of the respective parties *res adjudicata*, but that upon the merits the law is clearly for the Government.

See

United States vs. Southern Pacific Railroad Company, 146 U. S., 570.

United States vs. Southern Pacific Railroad Company, 146 U. S., 615.

Southern Pacific Railroad Company vs. United States, 168 U. S., 1, 66.

Southern Pacific Railroad Company vs. United States, 69 Fed., 47 (C. C. A.).

In the present case the Circuit Court adjudged that the United States was entitled to a decree quieting its title to the lands in controversy, being all the lands within the thirty-mile limits of the Atlantic and Pacific grant in California, except those covered by pre-

vious suits and except certain tracts dismissed from suit by the Government, and except certain tracts of land which the court adjudged had been sold by the Southern Pacific Railroad Company to third parties prior to commencement of this suit and as to which lands so sold the court adjudged that the United States take nothing. (86 Fed., 962, record 365, 336.)

Both parties having appealed to the Circuit Court of Appeals, that court affirmed the decree of the Circuit Court upon both appeals. (98 Fed,. 27, record 2630, 2672.)

Both parties have appealed from the decree of the United States Circuit Court of Appeals.

The grant to the Atlantic and Pacific Railroad Company was made by the act of Congress of July 27, 1866 (14 U. S., Stat. 292), and the grant of lands in California was for ten alternate sections of public land not reserved, claimed or otherwise disposed of *on each side* of the line of route of the railroad to be designated by the company by a plat filed in the Interior Department; also a right to indemnity for losses in place limits within a further limit of ten miles on each side, which made the granted limits embrace the alternate sections for twenty miles on each side and the indemnity for ten miles further, making altogether thirty miles on each side. (see section 3.)

The line of route of the Atlantic and Pacific described in the charter was from the town of Springfield, in Missouri, thence by Albuquerque, New Mexico, thence along or near the 35th parallel of latitude, "as near as may be found most suitable for a railway route

to the Colorado river at such point as may be selected by said company for crossing, and thence by the most practicable and eligible route to the Pacific."

The western terminus on the Pacific was not fixed, and the natural routes open to exploration were from the Colorado to the Bay of San Diego, to the Pacific at San Pedro, and the route by way of Soledad Pass to the Pacific at San Buenaventura. In the year of 1872, the company selected the latter route, and in that year filed its map of definite location upon that line from Needles on the Colorado to Ventura, by maps filed in sections, three maps embracing that part of the line in California between Needles and Ventura, and this completed the entire line of definite location from Springfield, Mo., to the Pacific.

The maps of the Atlantic and Pacific east of the Colorado river are not printed, it being stipulated that they were sufficient. [rec. *2615*.]

Section 6 of the act provided for a withdrawal of lands for the benefit of the company after the *general route* should be fixed.

When the Atlantic and Pacific filed its map of definite location in 1872, the Commissioner of the General Land Office withdrew and reserved for the benefit of the company all of the odd sections falling within thirty miles on each side of the line of route. [rec. 623, 624, 877, 878.]

The grant to the Atlantic and Pacific was *in praesenti* upon a condition subsequent that not less than fifty miles of road should be constructed each year after the second, and that the whole road should be completed by July 4, 1878. (see section 8.)

The grant further provided that if the company made any breach of the conditions and allowed the same to continue for upwards of one year, that the United States might do any and all acts and things needful and necessary to insure speedy completion of said road. (see section 9.) And Congress also reserved the right to alter, amend or repeal the act.

The Atlantic and Pacific Company by the year 1886 had failed to construct any railroad in California, and by the act of Congress of July 6, 1886 (24 Stat., 123), all lands and rights to lands in California were forfeited *and restored to the public domain.*

Atlantic and Pacific Railroad vs. Mingus, 165 U. S., 413.

United States vs. Southern Pacific, 146 U. S., 570, and 168 U. S., 1–66.

The Southern Pacific Railroad Company of California was authorized by Section 18 of the Atlantic and Pacific act to connect with the Atlantic and Pacific Railroad "at such point near the boundary line of the state of California as they shall deem most suitable for a railroad line to San Franscisco and * * * to aid in its construction shall have similar grants of land subject to all the conditions and limitations herein provided, and shall be required to construct its road on like regulations as to time and manner with the Atlantic and Pacific Railroad herein provided for." (see appendix.)

When this grant was made (1866) the Southern Pacific Railroad Company, a California corporation, was authorized and empowered by its articles of incorporation to construct a single line of railroad described in its charter as follows:

"from some point on the Bay of San Francisco in

the state of California, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles and San Diego to the town of San Diego, thence eastward through the said county of San Diego to the eastern line of the state of California." [rec. 526.]

In 1867 the Southern Pacific Company attempted to file a map of *general route* in the Interior Department, showing a line of railroad *from San Francisco via Mojave to the Colorado river at Needles*, but the Interior Department, after a long controversy, determined that this map was upon a totally unauthorized route not authorized by the charter of the company, the laws of California, or contemplated by the act of Congress.

The law required and contemplated that the Southern Pacific Railroad should be constructed upon the shortest practicable route to connect with the Atlantic and Pacific Railroad, but upon an authorized route.

The statute did not designate which "boundary line of California" was meant, but the nearest boundary line was the western or southern.

The charter of the Southern Pacific Railroad called for a line of railroad down the coast from San Francisco through Los Angeles county to San Diego, so that the route which was contemplated by Congress was to connect with the Atlantic and Pacific Railroad upon either the *southern* or *western* boundary line of the state.

Not only was that the *nearest* and most practicable route and the *only route authorized by the Southern Pacific charter* but to construct *to the eastern boundary line* involved the paralleling of the Atlantic and Pa-

cific Railroad coming from the east for a distance of more than 200 miles.

And it was held by three successive Secretaries of the Interior that the line shown upon this map was not authorized by the act of Congress or by the charter of the Southern Pacific Company.

Thereupon the Southern Pacific procured the passage of an act of the Legislature of California, approved April 4, 1870, authorizing the company to "change the line of its railroad so as to reach the *eastern* boundary line of the state of California by such route as the company shall determine to be the most practicable." * * * And the act further authorized the company to accept such grants as had been or might thereafter be made by Congress. (see appendix.)

Thereafter and on June 28, 1870, Congress passed a joint resolution by which the Southern Pacific was authorized to construct its road "as near as may be on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, 1867." (From San Francisco *via* Mojave to the Colorado at Needles.) And further provided that as each section of the road should be constructed patents to lands should issue "to the extent and amount granted to said company by said act of July 27, 1866, *expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act.*"

This resolution or act accomplished several results. It authorized the Southern Pacific Company to construct a railroad "as near as may be on the route indicated by the map filed January 3, 1867," from San Francisco via Mojave to Needles.

It expressly made to that company a grant of lands upon that line to the extent and upon the same terms made to the Southern Pacific Company by the act of July 27, 1866.

It expressly reserved the rights of settlers "*together with the other conditions and restrictions provided for in the third section of said act.*"

All of these favorable provisions of the joint resolution of 1870 were accepted by the Southern Pacific Company and acted upon by it, but one of the provisions of this act of 1870, was that it should be *subject to the terms and conditions of section 3, of the act of 1866*, which expressly provided that the grant shall be only of lands " not *reserved*, sold, granted or otherwise appropriated, and free from preëmption or *other claims* or rights *at the time the line of said route is designated by a plat.* * * *"

The Southern Pacific pursuant to the resolution of 1870 constructed that part of the railroad from Mojave to Needles on the Colorado river in the year 1885, and at that time filed in the Interior Department in sections, its maps showing the line of route as so constructed and located by the company, and the land grant to the company was adjusted upon those maps of constructed road. This is known as the Southern Pacific " main line grant." The Southern Pacific never filed any other maps than the general route map of 1867 and the sectional maps of constructed road, but that part of the road between Tres Pinos and Alcaldè has never been constructed and no map designating that part of the road has ever been filed by the company.

The grant to the Southern Pacific Railroad Company, by the joint resolution of 1870, overlapped the grant to the Atlantic and Pacific made by the act of 1866, from a point near Mojave to the Colorado river, and those lands are a part of the lands in suit here.

The grant to the Texas Pacific Railroad Company, act of Congress of March 3d, 1871, by section 23 of the act authorized the Southern Pacific Railroad Company

"to construct a line of railroad from a point at or near Tehachapi Pass (Mojave) by way of Los Angeles to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company, of California, by the act of July twenty-seven, eighteen hundred and sixty-six, *provided, however*, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other railroad company."

The Southern Pacific filed its map of *general route* under this grant of 1871, from Mojave *via* Los Angeles to Yuma, on April 3, 1871, and thereafter as the road was constructed filed its map of road, so constructed, and located, in five sections, during the years from 1874 to 1878 inclusive.

This grant to the Southern Pacific, known as "branch line grant," also overlaps the grant to the Atlantic and Pacific, and a part of the lands in such overlap are in controversy here.

In the present case the Southern Pacific claims the lands of the Atlantic and Pacific grant, as either primary or indemnity, under section 18, of the act of

Congress of July 27, 1866, or joint resolution of June 28, 1870, or act of March 3, 1871.

In appendix (3) to this brief, "Table of Dates," there is shown the date when each section of the map of definite location of the Atlantic and Pacific Company was filed; when approved and when the lands were withdrawn; also when the Southern Pacific Company filed its map of general route, and when it filed its sectional maps of definitely located and constructed roads on both its main and branch lines; and when the lands were withdrawn; also the action taken by the Interior Department thereon at different times, together with references to the record.

The Essential Facts Briefly Stated.

The Atlantic and Pacific Company filed its map of definite location, under its grant of 1866, in 1872, when the lands were withdrawn. The Southern Pacific Company filed its map of *general route* on its main line, on January, 3, 1867 (which was rejected), and filed its maps of definite location in sections thereafter pursuant to the joint resolution of June 28, 1870, *those sections covering the lands in suit herein were filed in the year 1885.*

The Southern Pacific Company filed its map of *general route* on its branch line from Mojave, via Los Angeles to the Colorado river, under the grant of 1866, on April 3, 1871, *and filed its map of definite location in five sections during the years from 1874 to 1878.*

From this general statement it will be seen that the following facts are evidenced:

First. That the Atlantic and Pacific grant was a

present grant which took effect July 27, 1866, long before either the main line grant or branch line grant to the Southern Pacific Railroad was made, and the title to the lands was vested in the Atlantic and Pacific Company until forfeited by the act of congress of July 6, 1886.

Second. Both the joint resolution of 1870 and section 23 of the act of 1871, provided that there should be excluded from the Southern Pacific grants respectively all lands *granted, reserved, disposed of or claimed* prior to filing the map of definite location of that company.

Third. That long before the Southern Pacific Company filed its maps of *definite location* on either the main line or branch line, these lands were *reserved* by operation of law from the filing of the maps of the Atlantic and Pacific Railroad approved by the Secretary of the Interior, and were also *reserved by the executive orders* of withdrawal, and they were "*claimed*" by the Atlantic and Pacific Company. The legal conclusions which result from the facts, follow with such certainty in view of the many cases deciding the principles involved, that it would seem that extensive argument should be unnecessary.

Former Adjudications.

In order to judicially determine the rights of the United States to the forfeited Atlantic and Pacific grant, several suits were brought in the year 1889 against the Southern Pacific Railroad Company, the trustees of its mortgage bonds and numerous purchasers from the railroad

The first four cases thus commenced involved lands within both the granted and indemnity limits of the Atlantic and Pacific grant and were decided in the Circuit Court adversely to the Government (see 45 Fed, 596 and 46 Fed., 683), but upon appeal to this court the decrees below were reversed and decrees ordered in favor of the Government for the relief sought. (see 146 U. S., 570–615–619.)

Those cases were argued twice in the Supreme Court and were given careful consideration as will appear from the opinions, and after they were decided the United States contended that the effect of those decisions was to determine the right of the United States to the whole of the forfeited Atlantic and Pacific grant in California, but the Southern Pacific Railroad Company contended that nothing was adjudged in those cases, but the title to the *particular tracts of land there sued for* and that the cases were not *res adjudicata* as to the title of *any other land* whatever.

Thereupon the United States pressed against the Southern Pacific Railroad Company another case involving some 700,000 acres of lands within the forfeited Atlantic and Pacific grant, and within the limits primary and indemnity of the grants to the Southern Pacific.

In that case the Circuit Court failed to give effect to the prior adjudications, but decided the case in favor of the Government upon the merits. (see 62 Fed., 531.)

Upon appeal by the Southern Pacific from this decree, the Circuit Court of Appeals affirmed the decree of the court below upon the merits, upon slightly dif-

ferent grounds from that upon which the decision of the Circuit Court was based, but did not decide as to the effect of the prior adjudications. (69 Fed., 47.)

Upon appeal by the Southern Pacific to this Court, the court affirmed the decree entered below (168 U. S., 1, 66), upon the ground as to the Southern Pacific Co., that the issues in the case had been distinctly presented and determined in favor of the United States in the former cases in 146 U. S., 570, 615, 619.

The opinion of this court upon the scope of the pleadings in the prior suits and the effect of the adjucations (168 U. S., 1, 66), shows that the court gave great consideration to the questions presented in order that there should be no misunderstanding thereafter as to the effect which should be given to the final decision of the court of last resort.

In that case the court said (pp. 48, 49) :

"The general principle announced in numerous cases is that *a right, question, or fact*, distinctly put in issue, and directly determined by a court of competent jurisdiction as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies, and even if the second suit is for a different cause of action the right, question, or fact once so determined must as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified"

The court held that the decisions in 146 U. S., 615, 619, conclusively determined that the Southern Pacific Railroad Company acquired no title to any of the lands in the Atlantic and Pacific grant.

The court, in the clearest and most unambiguous words of which the English language is suceptible,

stated what issues were presented by the pleadings, and then gave the *grounds* of their decision as follows (pp. 61, 62):

"For the reasons stated, we are of opinion that it must be taken in this case to have been conclusively adjudicated in the former cases, as between the United States and the Southern Pacific Railroad Company—

"1. That the maps filed by the Atlantic & Pacific Railroad Company in 1872 were sufficient, as maps of definite location, to identify the lands granted to that company by the act of 1866.

"2. That upon the acceptance of those maps by the Land Department, the rights of that company in the lands so granted, attached, by relation, as of the date of the act 1866; and

"3. That in view of the conditions attached to the grant, and of the reservations of power in Congress contained in the act of 1866, such lands became, upon the passage of the forfeiture act of 1886, the property of the United States, and by force of that act were restored to the public domain *without the Southern Pacific Railroad Company having acquired any interest therein that affected the power of the United States to forfeit and restore them to the public domain.*

"These grounds being accepted as the basis of our decision, the law in the present case is clearly for the United States; for, as all the lands here in controversy are embraced by the maps of 1872, and therefore appertain to the line located by such maps, it must be, for the reasons stated in the former decision, that the United States is entitled, as between it and the Southern Pacific Railroad Company, to the relief given by the decree below." (see 168 U. S., 61, 62.)

The grounds of this decision, as stated by the court, are not predicated upon the *classes of lands* into which counsel for the Southern Pacific Railroad Company has sought to divide its alleged grants, that is as to whether the lands are in the Southern Pacific "primary limits"

or "indemnity limits" or "main line limits", but is solely predicated upon the ground that the Atlantic and Pacific grant in California, from the Colorado to the Pacific, *is an entirety*, and for the purposes of the case must be regarded as a single tract, and that all questions as to its *validity, extent and operative effect* on the lands along the line and appertaining to it and its forfeiture to the United States *were in issue* and were determined in favor of the United States.

By these decisions the court has *finally determined* the *validity* and operative effect of *two instruments* embracing the Atlantic and Pacific grant in California,(1) the grant of July 27, 1866, to the Atlantic and Pacific Company definitely located by the maps of 1872, and which location operated upon the lands along and pertaining to the road, and (2) the re-conveyance to the United States by the act of forfeiture of July 6, 1886.

The court also determined a third question equally important, viz., that in re-taking the grant under the act of 1886, *it was so re-taken freed from all claims of the Southern Pacific Company.*

Any claim of any kind to this grant now made by the Southern Pacific again denies the validity of these determinations and cannot be tolerated under the settled principles of *res adjudicata.*

The view of counsel for the Southern Pacific, that the controling questions in the former cases were *as to the title of certain classes of their lands*, is quite different from the view that the controling questions were as to the validity and effect of the instruments, making a grant of all these lands to the Atlantic and Pacific by

the act of 1866, and the instrument re taking them by the act of 1886 free of all claims of any kind by the Southern Pacific.

The records of the cases in 146 U. S., are in evidence, and the Southern Pacific Railroad Company and D. O. Mills and G. L. Lansing (now Homer S. King substituted for Lansing), trustees, were paaties. They are also parties here and are bound by the prior adjudication.

The defendant Central Trust Company in the present case is *in privity* with the Southern Pacific Company, as will be hereinafter shown, and is also bound by the prior adjudications.

Evidence of Former Adjudications.

On the trial of the case at bar in the Circuit court, the Government put in evidence the identical evidence introduced and before the court in the former cases before mentioned—the same maps of definite location of the Atlantic and Pacific Company, and the Interior Department letters and orders approving those maps, and ordering withdrawal of granted and indemnity lands.

The Government also introduced in evidence, *as conclusive of the controlling issues in the case at bar, the final records of the former cases*, including the pleadings, final decrees, mandates and opinions of the court in 146 U. S., 570, 615, 619.

The record of the case of U. S. vs. S. P. R. R. Co., *et al.* (146 U. S. 570), involving lands in the *primary or twenty-mile limits of the Atlantic and Pacific*, is found in the record as follows:

Bill of Complaint, record 721, 734;
Answer, record 778, 805;
Replication, record 805;
Mandate of Supreme Court, record 813;
Opinion of Supreme Court, record 825, 819;
Final decree, record 816.

The record of the case involving lands in the Atlantic and Pacific *indemnity* limits (146 U. S., 619) is found in the record as follows:

Bill of Complaint, record 644, 684;
Answer, record 684–707;
Replication, record 708;
Mandate, Supreme Court, record 709, 712;
Opinion Supreme Court, record 825, 819.
Final decree, record 713.

The Pleadings and Issues in the Present Case.

AS TO THE SCOPE OF THE BILL.

In the courts below, counsel for the railroad advanced the claim that the scope of the bill in the present case was only to vacate patents to the particular lands described in exhibit "A" to the bill, and did not embrace the remaining lands within the forfeited Atlantic and Pacific grant, notwithstanding that the answer took issue on all the allegations of the bill and alleged title in the defendants to the Atlantic and Pacific grant in California under both the acts of 1866 and 1871. For this reason, as well as to show that the issues are *res adjudicata*, material parts of the bill will be set forth.

This bill, as clearly disclosed upon its face, is brought

to annul patents to certain lands described in exhibit "A" to the bill, *and to determine the title of the United States to all of the lands in sections designated by odd numbers within the state of California, falling within the thirty-mile limits of the grant to the Atlantic and Pacific Railroad Company made by act of July 27, 1866*, and which line of road was definitely located in the year 1872, estimated to contain upwards of three millions of acres, but there is excepted from the suit certain lands the titles to which have been quieted in former suits brought by the United States against the same parties.

The essential allegations of the bill, describing the lands, and showing the grant made to the Atlantic and Pacific Company by the act of 1866, the acceptance of the grant, definite location of the road, breach of condition in failure to construct the road, and the forfeiture of those lands to the United States by the act of July 6, 1866, and the allegation of ownership of these lands by the United States, and prayer for relief are as follows:

"Your orators further show: that by the act of Congress approved July 27, 1866, entitled, 'An act granting lands to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific Coast,' Congress incorporated the Atlantic & Pacific Railroad Company and granted to said company, to aid in the construction of said railroad, a large amount of lands in the state of California and other States and Territories, and to the whole of which said act your orators refer. (see United States Statutes, Vol. 14, p. 292.) * * * *

"Your orators further show that said Atlantic & Pacific Railroad Company duly accepted said grant,

and the terms and conditions of said act, of July 27, 1866, within the time therein required, and did designate upon plats or maps the whole of its line of route under said act, definitely locating the same from Springfield, Missouri, by way of the points and places named in said act, in the time and manner provided in said act, to the Pacific ocean at San Buenaventura, in the state of California, and did file such plats or maps designating said line of route, in the office of the Commissioner of the General Land Office, within the time and in the manner provided in said act, definitely establishing the whole thereof.

"That said company filed maps of definite location designating that part of its said line in the state of California, in said office of the Commissioner of the General Land Office in the year 1872, and as said plats or maps were so filed in the Interior Department they were each then approved by the Secretary of the Interior, and upon the filing of such maps or plats as aforesaid, the United States withdrew from market and reserved all the odd numbered sections of land in California within thirty (30) miles of said line of route, including the lands hereinafter described, and in pursuance of orders of the Secretary of the Interior and Commissioner of the General Land Office, said withdrawal and reservation of said lands was made then of record in the General Land Office and United States district land offices in California, by proper plats, diagrams and maps, to all of which your orators refer.

* * * * * * * * * *

"Your orators allege that said Atlantic & Pacific Railroad Company did not, within the time or manner required by said act of Congress of July 27, 1866, nor at all, construct or complete any railroad or telegraph line, in whole or in part, within the state of California, and that by the act of Congress of July 6, 1886 (24 Stats., p. 123), all lands and rights to lands granted to and conferred upon said Atlantic & Pacific Railroad Company, and situated within the state of California, were forfeited and resumed to the United States, *and said lands were restored to the public domain, including*

all the odd numbered sections of land for thirty (30) miles on each side of said line of route of said Atlantic & Pacific Railroad Company definitely fixed as aforesaid between the eastern boundary of California and the Pacific ocean at San Buenaventura, which lands are still owned by your orators."

* * * * * * * * *

And the bill among other things prays as follows:

" *Your orators further pray that the Court will define and determine the rights of your orators to the odd numbered sections of land in California within the thirty-mile limits of the said line of route of said Atlantic & Pacific Railroad Company, as shown by the maps of said Atlantic & Pacific Railroad Company on file and of record in the General Land Office, and will decree that the United States are the owners in fee of said lands, as against all rights and claims of the defendants based upon or through said grants made by the United States by said acts of Congress, approved July 27, 1866, and March 3, 1871.*

* * * * * * * * *

" Your orators pray for such other and further relief as to the court may seem equitable. * * *"

The prayer of the bill was amended by asking further relief as against the defendant's claims under the resolution of 1870 and act of 1866. [rec. 36, 37.]

The amendment was not necessary to authorize the court to grant the relief to the United States under the prayer for general relief and under the prayer to quiet title to all the lands within the Atlantic and Pacific grant, but if there were any doubt, that ambiguity was clearly removed by the amendment.

The Answer.

The answer of the Southern Pacific Company and other defendants admits the failure of the Atlantic and Pacific Company to construct any railroad in California,

and admits that all rights to lands of that company were forfeited and restored to the public domain by the act of July 6, 1886, but puts in issue every other material allegation of the bill.

The answer sets forth at length the alleged grants by Congress of the lands in suit to the Southern Pacific Railroad Company by section 18 of the act of July 27, 1866, joint resolution of June 28, 1870, and section 23 of the act of March 3, 1871. (rec. 55–89.)

The answer contains the following:

"Said defendants deny that said Atlantic and Pacific Railroad Company filed maps of definite location designating part of its line in the state of California, in the said office of the Commissioner of the General Land Office, in the year 1872, or at any time or at all. * * * * * * * * "

The answer also denies that the maps were approved and that any withdrawal was made for the Atlantic and Pacific Company.

The answer also contains the following:

"Said defendants deny that said Atlantic and Pacific Railroad Company had or claimed to have a prospective right or a present right or a prospective as well as a present right to said lands in controversy. * * * * * * * " "The defendants allege that the plaintiff has no right, title or interest whatsoever in or to said lands or any part thereof. That all of said lands were granted to and are owned by these defendants as is hereinbefore particularly set forth, and that the Department of the Interior has no authority or power to sell or in anywise dispose of said lands."

The United States filed a general replication to the answer, thereby putting in issue all of the allegations of the answer.

The court will observe that the controlling issues in the case are the following:

(1) Whether a valid grant was made to the Atlantic and Pacific Railroad Company by the act of July 27, 1866.

(2) Whether that company filed its map of definite location.

(3) Whether the maps were approved by the Interior Department.

(4) Whether the act of Congress of July 6, 1886, forfeited those lands and restored them to the public domain free and clear of all rights of the Southern Pacific Railroad Company to them.

(5) Whether the grants to the Southern Pacific operated upon any lands within the limits of the Atlantic and Pacific grant.

That these issues were all determined in the first cases in favor of the Government and against the Southern Pacific Railroad Company, the trustees of its mortgage bonds and those in privity with them, clearly appears from the opinions of the court in 146 U. S., 517, 619, and 168 U. S., 1, 66.

The Lands in Suit.

The Government dismissed from the present suit on January 7, 1898, a list of lands which had been patented to the railroad and sold to third parties prior to commencement of suit, which lands are described in the decree.

Of the patented lands remaining in suit 360 acres were patented prior to commencement of this case.

The bill in the present case was filed May 14, 1894, and thereafter and *pendente lite* patents were erroneously issued by the Interior Department to the Southern Pacific for about 30,000 acres of lands embraced in the suit and within the Atlantic and Pacific grant. Prior to the suit the railroad had made executory contracts to third parties for these lands so patented *pendente lite*, and had received about one-fifth of the purchase price, and the contracts provided in effect that the company had not received patents or title to these lands, and that if it failed to do so the contract should be void and the money paid should be refunded.

While the Circuit Court gave the Government a decree for all of the lands in the Atlantic and Pacific grant, except those above named, the court dismissed the bill as to those 30,000 acres patented *pendente lite* although it appeared that the railroad held the *legal title* to the lands, subject to the payment of the bulk of the purchase price, which still remained unpaid. (Record 336, 353.)

Pleas in Abatement.

This suit having been brought to enforce a claim to real estate and to remove a cloud upon the title, such of the defendants as were non-residents of the state were served by publication.

Defendants Southern Pacific Railroad Company and D. O. Mills and G. L. Lansing, trustees, alleged to be citizens of California, residing at San Francisco in the northern district, who were personally served in the state (rec. 40, 41), and the Central Trust Company of

New York, a citizen of the state of New York, filed pleas in abatement and to the jurisdiction. [record 42, 46.]

The pleas upon full argument were overruled [record 49, 51] upon the grounds clearly shown in the opinion filed by Judge Ross of the Circuit Court [see 63 Fed., 481, 486], that there is an essential difference between suits *in rem* and suits *in personam*, and that a suit to enforce a claim to real estate or to remove a cloud upon the title is "substantially a suit in rem" within the doctrine of cases, such as Arndt vs Griggs, 134 U. S., 316, and, therefore, that the court could entertain jurisdiction of the cause upon service by publication, as provided by section 8 of the act of March 3, 1875.

Since the opinion of Judge Ross was rendered upon this question, the whole matter has been entirely put at rest, and in accordance with the views of the Circuit Court in the decisions in

Greeley vs. Lowe, 155 U. S., 58.

Dick vs. Foraker, 155 U. S., 404, 410, 411.

But as the ruling of the Circuit Court in overruling the pleas is not assigned as error, the contention has doubtless been abandoned by defendants.

Jurisdiction in Equity.

The relief sought by this bill is to cancel patents erroneously issued to a part of the lands, and to quiet and determine the title to the lands in California within the Atlantic & Pacific grant, not embraced in former suits.

The jurisdiction in equity is grounded upon: (1)

cancellation of the patents, and (2) the quieting of title conferred by California statute, Code Civil Procedure, section 738, authorizing suits to quiet title, and which statute will be administered by the United States courts in equity. (Moore vs. Steinbach, 127 U. S., 70, 84.)

In the present case the defendants answered to the merits, without raising any question as to the jurisdiction in equity, and put the United States to its proof, and as the Circuit Court had undoubted power to grant the relief sought, any objection to the jurisdiction in equity was waived. (Perrego vs. Dodge, 163 U. S., 160, 164. Brown vs. Lake Superior Co., 134 U. S., 530, 535.)

Assignment of Errors.

(On cross-appeal of United States.)

1. The court erred in decreeing that the United States take nothing as to the lands, or any of them, adjudged by said decree to have been sold by the Southern Pacific Railroad Company to third persons in good faith and for value, being the lands described on pages No. 15 and No. 20, inclusive, of said decree, except the southeast one-quarter of section 25, township 9 north, range 15 west, San Bernardino meridian, it appearing that said lands had been contracted to be sold by said railroad company to third persons upon partial payments, and that only a part of the purchase price had been paid, and that no sale had been completed or deed to any of said lands executed prior to the commencement of this suit.

2. The court erred in refusing to adjudge the United States to be the owner of and to quiet its title to the said lands, or any of them.

3. The court erred in refusing to adjudge that the defendants had no title or interest in said lands or any of them.

4. The court erred in refusing to adjudge the

United States to be the owner of the legal title to said lands and of all interest and estate claimed by the Southern Pacific Railroad Company therein, subject only to the equities in favor of said purchasers respectively to the amounts actually paid upon the purchase price.

5. The court erred in adjudging that patents issued by the United States to defendant Southern Pacific Railroad Company for said lands, pending this suit, granted to or conferred upon the defendants, or any of them, any right, title, or interest in said lands or any of them.

6. The court erred in adjudging that said lands described as aforesaid, or any of them were sold by the Southern Pacific Railroad Company to third persons in good faith or for value.

7. The court erred in adjudging that the terms of the contracts, under which said purchasers and each of them contracted to purchase said lands, did not carry notice to such purchasers, and each of them, of the right and title of the United States to said lands.

8. The court erred in refusing to adjudge what title and rights the defendants before the courts had in said lands.

9. The court erred in refusing to adjudge what title and rights the defendants before the court had in said lands.

10. The court erred in refusing to give the United States a decree for those lands adjudged to have been sold by the Southern Pacific Railroad Company since November 22, 1889, the date of commencement of the suits in the cases reported in 146 U. S., 615–619.

11. The court erred in refusing to adjudge that the Southern Pacific Railroad Company and those in privity with that company, who contracted to purchase lands while the former suits reported in 146 U. S., 615–619, were pending, were not bound by the adjudication in those cases.

12. The court erred in adjudging that any executory contract for the sale of land made by the Southern Pacific Railroad Company is valid as to any pay-

ment made thereon after notice to the purchaser of the rights of the United States.

Points and Authorities.

First Point.

THE QUESTIONS AND CLAIMS IN ISSUE BETWEEN THE PARTIES IN THE PRESENT SUIT, WERE IN ISSUE AND WERE FINALLY AND CONCLUSIVELY DETERMINED IN THE FORMER SUITS BETWEEN THE SAME PARTIES REPORTED IN 146 U. S., 570, 615, 619.

As to what questions, claims and facts were in issue and finally determined in the former cases in 146 U. S. can hardly be stated more clearly than has already been done in 168 U. S., 1, 66.

Notwithstanding that the court evidently supposed it had for ever put at rest all questions as to the scope, validity and effect of the grant to the Atlantic and Pacific Company in California, and as to the operation and effect of the forfeiture of that grant by the act of Congress of July 6, 1886, and as to whether any grant, or claim of the Southern Pacific Railroad Company could operate upon or affect any right of the United States to forfeit those lands and to restore them to the public domain, we find that the Southern Pacific Company is contending here that the former decisions related only to *certain tracts of land* or certain *classes* of land, and that nothing has been adjudged as to the rights of that company to the Atlantic and Pacific grant, under the grant to the Southern Pacific Company by the act of July 27, 1866, and resolution of June 28,

1870, and as to the *rights* of the Southern Pacific to *select* as *indemnity* the lands of the Atlantic and Pacific grant falling within the indemnity limits of the Southern Pacific grants.

The effort of the Southern Pacific Company to distinguish the present case from the cases in 146 U. S., 570, 615, 619, is similar to that assumed by the company in 168 U. S., 1, 66, but however ingenious the argument, the court would not allow counsel for the company to make out that a different question or issue was presented, because slightly different words or phraseology might have been used in the different answers filed by that company, and the court could not see its way clear to say that a different *question* or *claim* was presented because different or other testimony had been taken, and the court, quoting from Last Chance Company vs. Tyler Company, 157 U. S., 690, said:

"The essence of estoppel by judgment being that there has been a judicial determination of the facts, and the question always is, has there been such determination? *and not upon what evidence or by what means was it reached.*"

The court also said:

"The general principle announced in numerous cases is that a *right*, *question* or *fact* distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question, or fact, once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure

the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of the rights of persons and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect to all matters properly put in issue and actually determined by them."

In the former case the amended bill of complaint of the United States against the Southern Pacific Railroad Company et al., which was filed December 22, 1889, and the decision in which case is reported in 146 U. S., 615, 619, alleged that a grant was made to the Atlantic and Pacific Railroad Company by the act of Congress approved July 27, 1866.

The amended bill then proceeds to quote the provisions of said act, and then alleges as follows [rec. 669]:

"Your orator alleges that by and pursuant to said act of Congress, the Atlantic and Pacific Railroad Company was created and duly organized, and on November 23, 1866,, within the time and in the manner provided in said act, accepted said grant, and did designate the line of its route from Springfield, Missouri, to the Pacific by maps and plats thereof, which it filed in the office of the Commissioner of the General Land Office, in manner following, to-wit:

On or about March 9, 1872, said company filed in the office of the Commissioner of the General Land Office maps designating the line of its route and showing the general features of the country and vicinity as follows:

First—From San Francisco to San Miguel Mission, in California.

Second—Map of its route from San Miguel Mission via Santa Barbara and San Buenaventura, to a point in township 2 south, range 17 west, San Bernardino Base and Meridian, in California.

Third—Map of its route from said point last men-

tioned to a point in township 7 north, range 7 east, San Bernardino Base and Meridian, in California.

Fourth—Map of its route from said point last named to the Colorado river, and thereafter, on or about March, 1872, said company filed in said office as aforesaid its several other maps designating its route from said point last named to Springfield in the state of Missouri, making altogether a continuous line designating its entire route, and showing the general features of the country from said town of Springfield, Missouri, by way of the points named in said act of Congress of July 27, 1866, to the Pacific at San Buenaventura, and from there to San Francisco, and in the manner provided in said act, and such designation was accepted by the United States.

Your orator alleges that said several parts of its map, filed as aforesaid, made and constituted the entire route or line of said Atlantic and Pacific Railroad Company, fully designating the whole thereof.

Your orator alleges that on March 9, 1872, and on April 22, 1872, the Secretary of the Interior and the Commissioner of the General Land Office, respectively, ordered all the odd sections of land within thirty miles on each side of said designated route of said Atlantic and Pacific Railroad Company reserved from sale and withdrawn.

Your orator alleges that said Atlantic and Pacific Railroad Company did construct and complete a portion of its road west of Springfield, Missouri, in the time and manner required by said act, but did not at any time construct or complete any railroad west of the Colorado river.

Your orator further shows that by the act of Congress approved July 6, 1886, entitled, 'An act to forfeit the lands granted to the Atlantic and Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific Coast, and to restore the same to settlement and other purposes,' all the lands and rights to lands in California theretofore granted and conferred upon said Atlantic and Pacific Railroad Company were

forfeited, resumed and restored to entry for non-completion of that portion of said railroad to have been constructed in California." [rec. 670, 671.]

These allegations of the bill were denied and put in issue by the answer of the Southern Pacific Railroad Company and other defendants.

The answer contains the following:

"The defendant admits that by and under said last mentioned act of Congress (July 27, 1866) the Atlantic and Pacific Railroad Company was created and organized and did duly accept the provisions of said law within the time and in the manner provided in said act, but it *denies that said Atlantic and Pacific Railroad Company did designate the line of its route from Springfield, in the state of Missouri, to the Pacific Coast*, as required by said act." [rec. 688.]

* * * * * * * * *

"Said company (A. & P. R. Co.) filed two maps, and claimed that they were filed for the purpose of locating parts or fragments of a line for its road in the state of California, but the defendant denies that said maps constituted a valid location of said road in California. Certified copies of said maps are annexed to the answer heretofore filed in this suit by this defendant and marked Exhibit "A," Nos. 1 and 2, which, with the endorsements thereon, are now herein referred to and made part of this answer; and this defendant says that said railroad was not located or attempted to be located on or about March 9, 1872, or at any such time, in California, either in whole or in part, otherwise than aforesaid by said maps. *This defendant denies that the Atlantic and Pacific Railroad Company, by or through the filing of said maps, acquired the right to any lands of the United States lying opposite to the lines or route marked on said maps, and denies that said company acquired the right to select any public lands along said routes or lines as 'other lands' in lieu of sections within twenty miles that had been granted, sold, 'reserved, occupied by homestead settlers, or preempted or otherwise disposed of' by the United States.*"

"These maps were sent to the General Land Office by the Secretary of the Interior with a letter dated March 9, 1872, of which a certified copy is annexed to said answer heretofore filed, marked Exhibit 'B'."

"This defendant says that the lands mentioned in the amended bill herein lie opposite to the line of route marked on the said map, designated in said letter as No. 2 of a portion of the proposed road of the Atlantic and Pacific Railroad Company, that is, a piece of road within the state of California, 'from a point on the western boundary line of Los Angeles county, California, to a point in township seven (7) north, range seven (7) east, of San Bernardino meridian in said state.'" [rec. 688, 689.]

* * * * * * * * * *

"Further answering, this defendant says that the Atlantic and Pacific Railroad Company afterward, viz., on the 13th day of August, 1872, filed in the Department of the Interior two other maps which it claimed were intended to designate the line of other fragments or portions of the railroad in California. Certified copies of said maps, and of the letter of the Secretary of the Interior of April 16, 1874, in respect thereto, are annexed to the answer filed heretofore in this suit, by this defendant, marked Exhibit 'C,' Nos. 1 and 2, and are now herein referred to and made part of this answer. And this defendant denies that said maps constituted a valid location of the parts or fractions of road therein described, *and denies that the four maps hereinbefore mentioned of four several parts of the road* (from Colorado river *via* the Pacific at Ventura to San Francisco) *constituted a valid location of the said Atlantic and Pacific Railroad in California.* And it denies that the said Atlantic and Pacific Railroad was ever in any otherwise lawfully located in the state of California. The grant of lands by the said act of Congress of July 27, 1866, hereinbefore mentioned, was made to aid in the construction of a railroad 'beginning at or near the town of Springfield, in the state of Missouri, thence to the western boundary line of said state, and thence by the most elegible railroad route

as shall be determined by said company to a point on the Canadian river; thence to the town of Alburquerque, on the river Del Norte, and thence by the way of the Agua Frio or other suitable pass, to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific' (14 Stat., 292.) *And the defendant says that there is nothing in or upon said maps to identify the same as the line of road mentioned in the said act of Congress.*"

And this defendant says, that it was further provided by said act as follows, that is to say:

'SEC. 18—And be it further enacted, that the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for.'

And that the construction of a railroad from the Colorado river to San Francisco was expressly relegated and appropriated to this defendant, and the said Atlantic and Pacific Railroad Company was never authorized to construct any such line of railroad or to acquire any lands by reason of or in respect of the construction or proposed construction of any such line. [rec. 690–692.]

* * * * * *

The said parts of its (A. & P. R. Co.'s) *map, when taken together, showed a line terminating at San Fran-*

cisco, which was not the terminus provided for by said act of Congress. [rec. 692.]

This defendant denies that on March 9, 1872, and April 22, 1872, or at any such times, the Secretary of the Interior, and the Commissioner of the General Land Office, ordered all the odd sections of land within thirty miles on each side of the designated route of the said Atlantic and Pacific Railroad Company reserved from sale and withdrawn.

* * * * * * *

This defendant avers that the lands involved in this suit had previously, on the 3rd, April, 1871, by the filing of the map of definite location of the defendant's railroad, been *duly reserved* from sale by and under the said twenty-third section of the act of Congress of March 3, 1871, and the 6th session of the act of Congress of July 27th, 1866, which said sections are quoted in the bill of complaint herein, and avers also that said lands had been duly withdrawn from market *and appropriated* for the use of this defendant by the order of the commissioner of the general land office to the register and Receiver of the United States land office at Los Angeles, issued April 21, 1871, a copy of which is hereto annexed *marked* 'R' and made a part of this answer." [rec. 693.]

The *general replication* filed by the United States put in issue *all of the allegations of this answer.* [record 708.]

Other allegations of the bill and of the answer might be quoted for the convenience of the court, but inasmuch as they have been set forth at length by the court in 168 U. S., 1, 66, it is believed that further quotation from the pleadings in that case are unnecessary.

The bills of complaint filed by the United States in the former cases which were decided in 146 U. S., 570,

614, were similar to the bill filed November 22, 1889, in the case reported in 146 U. S., p. 619, [record 721], and in those cases D. O. Mills and G. L. Lansing, trustees (now D. O. Mills and Homer S. King), were parties defendant and they are parties defendant here. The answer of the Southern Pacific Railroad Company, D. O. Mills and G. L. Lansing, trustees, in those cases contained the following further averment:

"*But respondents deny that by said act (July 27, 1866), any grant of lands was made to the Atlantic and Pacific Railroad Company, which attached to the surface of the earth in the State of California, or took any lands in the State of California from out the public domain.*" [record 779–780.]

From these pleadings it appears that the *issues presented* and the *claims made* by the respective parties were the following:

The United States claimed that a valid grant had been made from Springfield, Missouri, to the Pacific ocean at San Buena Ventura to the Atlantic and Pacific Company, which grant in the state of California, primary and indemnity limits, was thirty miles wide on each side of the route, embracing alternate sections.

That the Atlantic and Pacific Company *definitely located* its line of railroad from Springfield, Missouri, to the Pacific ocean according to law, and that such plats were *accepted* by the United States in *1872*, and at that time the lands falling within the primary and indemnity limits were *withdrawn* from market and *reserved*, and were appropriated to that company.

That the Atlantic and Pacific violated the conditions

of its grant by failing to build the road, and that the entire grant in California was *forfeited*, resumed and *restored to the public domain* by the act of Congress of July 6, 1886.

These claims of the Government were all denied by the Southern Pacific Company and by the other defendants.

The Southern Pacific Company and the trustees of the mortgage bonds made the following claims:

That a grant of lands was never made to the Atlantic and Pacific Railroad Company in the state of California.

That that company never filed any map of definite location of its line of railroad, or otherwise identified any line of route or any lands contiguous to any such line.

That the grant of lands and authority to build a railroad from Needles on the Colorado river to the Pacific ocean was never conferred upon the Atlantic and Pacific Railroad Company, but in the language of the answer, referring to section 18 of the act of July 27, 1866, and of the maps filed by the Atlantic and Patific from the Colorado river via Ventura to San Francisco, that the said grant and right "*was expressly relegated and appropriated to this defendant* * * *."

That section 18 of the act of 1866 made a grant to the *Southern Pacific Railroad Company* upon the very line which the Atlantic and Pacfic Company accepted and upon which it filed its map of definite location, and consquently that the Southern Pacific Company was entitled to that grant and not the Atlantic and Pacific Company.

That the grant to the Atlantic and Pacific Company never took effect "on the surface of the earth in the state of California."

That the lands within the limits of the Atlantic and Pacific grant were granted to the Southern Pacific by the acts of 1866 and 1871.

That the operative effect of the act of Congress of July 6, 1886, was not to restore to the public domain the grant to the Atlantic and Pacific, but that it was wholly inoperative as affecting any lands in California or the rights of the Southern Pacific to them. (see 168 U. S., 38, 39, 40.)

These claims of the Southern Pacific Company were put in issue by the United States by general replication to the answer.

Upon the issues thus joined and proofs made by the respective parties, the Circuit Court entered decisions in favor of the defendants dismissing the bills of complaint, from which appeals were taken to this court. (see 39 Fed., 132; 40 Fed., 611; 45 Fed., 596; 46 Fed., 683.)

Upon appeal to this court it was adjudged that sufficient and valid maps of definite location were filed in the year 1872 by the Atlantic & Pacific Railroad Company, which took effect upon the lands along the line of route in California, between the Colorado river and the Pacific ocean, and that the title and right to those lands remained in the Atlantic & Pacific Railroad Company, subject to a condition subsequent, and that upon failure to construct the road the grant to the Atlantic & Pacific Railroad was forfeited and resumed by the

United States by the act of Congress of July 6, 1886, and that the Southern Pacific Railroad Company acquired no right or title to those lands. (See 146 U. S., 570, 615, 619.)

And the court said, at page 603:

"There never was a time, therefore, at which the grant of the Southern Pacific could be said to have attached to these lands, and the plausible argument based thereon, made by counsel in behalf of the Southern Pacific Company, falls to the ground."

The court further said, at page 607:

"Our conclusions, therefore, are, that a valid and sufficient map of definite location of its route from the Colorado river to the Pacific ocean was filed by the Atlantic and Pacific Company, and approved by the Secretary of the Interior; that by such act the title to these lands passed, under the grant of 1866, to the Atlantic and Pacific Company, and remained held by it subject to a condition subsequent until the act of forfeiture of 1886; that by that act of forfeiture the title of the Atlantic and Pacific was retaken by the general government, and retaken for its own benefit, and not that of the Southern Pacific Company; and that the latter company has no title of any kind to these lands. *The decrees of the Circuit Court must be reversed, and the cases remanded with instructions to enter decrees for the plaintiff for the relief sought.*"

The Southern Pacific Company, still disputing the effect of the former adjudications in the cases in 146 U. S., compelled the Government to press to final decree other suits against that company, including the case against the Southern Pacific Railroad Company, et al., reported in 168 U. S., 1–66, in which case the court then adjudged, as it had in the former suits, that the lands appertaining to the Atlantic & Pacific grant in California, between the Colorado river

and the Pacific were forfeited in 1886 by the United States, without the Southern Pacific having acquired any right, title or interest therein that affected the power and authority of the Government to forfeit them and retake them.

The cause reported in 168 U. S., 1–66, was not only brought for lands within the Atlantic & Pacific grant claimed by the Southern Pacific under the act of March 3, 1871, called the "branch-line grant", but also embraced a large quantity of lands claimed by the Southern Pacific Company under the act of July 27, 1866, called the Southern Pacific "main-line grant"; and the lands embraced in the case in 168 U. S., 1–66, included:

(1) Lands in Atlantic and Pacific granted limits and granted limits of Southern Pacific Railroad branch line;

(2) Lands in Atlantic and Pacific granted limits and Southern Pacific indemnity limits branch line;

(3) Lands in Atlantic and Pacific indemnity limits and Southern Pacific granted limits branch line;

(4) Lands in Atlantic and Pacific indemnity limits and Southern Pacific indemnity limits branch line;

(5) Lands in Atlantic and Pacific granted limits and Southern Pacific granted limits main line;

(6) Lands in Atlantic and Pacific granted limits and Southern Pacific indemnity limits main line;

(7) Lands in Atlantic and Pacific indemnity limits and Southern Pacific granted limits main line;

(8) Lands in Atlantic and Pacific indemnity limits and Southern Pacific indemnity limits main line.

It was vigorously argued and at great length by counsel for the Southern Pacific in the case in 168 U. S., that the principle of *res adjudicata* could not be applied to the lands there involved, because the lands were in a *different class* from those involved in the cases in 146 U. S., but the *ground upon which the court rested its decision precluded the Southern Pacific Railroad Company and those in privity with it from claiming the lands in California appertaining to the Atlantic and Pacific grant, which it had been adjudged were forfeited and restored to the public domain in 1886, without the Southern Pacific Company having acquired any interest in those lands.*

THE CASE OF SOUTHERN PACIFIC VS. UNITED STATES, 168 U. S., 1, 66, WHICH INVOLVED LANDS IN THE ATLANTIC AND PACIFIC GRANT CLAIMED BY THE SOUTHERN PACIFIC UNDER BOTH ITS "MAIN LINE" GRANT OF 1866 AND "BRANCH LINE" GRANT OF 1871, WAS DECIDED *AFTER* THE PRESENT CASE WAS ARGUED AND SUBMITTED IN THE CIRCUIT CO T (Record 334), AND THEREFORE THE R CORD IN THAT SUIT WAS NOT INTRODUCED IN EVIDENCE IN THE PRESENT CASE, BUT THE QUESTIONS THERE DECIDED CONTROL EVERY ASPECT OF THE PRESENT SUIT.

The contention now made by the Southern Pacific that the court did not decide, in Southern Pacific Railroad vs. United States, 168 U. S., 1, against the claim of that company to lands within its "main line" grant

under the act of July 27, 1866, and joint resolution of June 28, 1870, is fully met by the claims made in that suit, the evidence in the case, the decree of the courts below, the arguments of counsel for the railroad company, the opinion of this court and especially by the grounds of that decision.

The seven hundred thousand acres of land involved in that suit are described in the opinion of the court (168 U. S., 24), the location of which with respect to the main and branch lines of the Southern Pacific and Atlantic and Pacific grants can be readily ascertained by reference to the maps in evidence in the former case (see map 33), and in the present case by the same map at page 640.

The answer of the Southern Pacific Railroad Company and of the other defendants in the case in 168 U. S. 1–66, upon which issue was joined by general replication, distinctly set up and averred *a claim of right* to the lands embraced in that suit under its "main line grant" of July 27, 1866, as well as its "branch line grant" of March 3, 1871.

Counsel for the Southern Pacific have seen fit to quote from the oral argument in the Circuit Court of Appeals of counsel for the Government, in the attempt to show that there was no issue as to the main line grant in either of the lower courts or in this court in that suit; but what was contended in the Court of Appeals as well as in this court in that cause by counsel for the Government was that the Southern Pacific Company had badly pleaded its cause and had weakly supported it by evidence in failing to distinctly aver

and prove a definite location and construction of the road.

But the claims of that company to that grant and the proofs to support them were made in their own peculiar way.

In the answer of the Southern Pacific in that cause, which was filed May 1, 1891, and which was a part of the record in the Circuit Court and in the Circuit Court of Appeals, *but which for some reason, is not contained in the printed record in that cause, in this court,* contains the following averments:

"The respondents deny that the said Atlantic and Pacific Railroad Company was authorized by said act or any other act of Congress to locate or construct a line of railroad from the crossing of the Colorado river to San Francisco. They are advised and believe, and therefore aver, *that under said act of Congress the respondent, the Southern Pacific Railroad Company, alone was authorized to construct a line of railroad from the crossing of the Colorado river to San Francisco and to acquire lands under said act of Congress along and opposite said line* * * * * *

The respondents admit that the lands described in the complainant's bill are not mineral lands and that they have never been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of by the United States, *except as they have been granted to the Southern Pacific Railroad Company under said Congressional grants, made July 27, 1866, and March 3, 1871.* * * * * * *

As to the other lands described in said bill of complaint, and not included in the said schedules, Exhibits A, B, C, and D above mentioned, *the respondents claim the right to locate and select under said acts of Congress of July 27, 1866, and March 3, 1871*, all such as are or at the time of the accrual of their rights under said acts were public lands, not excepted from said grants."

In the amended answer of the Southern Pacific Company and others, in that cause, filed June 12, 1893, it is averred as follows: (record No. 71, October 1, 1900. 168 U. S.)

"The said respondents aver that the said Atlantic and Pacific Railroad Company never made any actual or definite location of its railroad in California, nor constructed any part of a railroad in said state, under or according to the act of Congress approved July 27, 1866, or any amendments, modifications or supplements thereto, or otherwise howsoever.

* * * * * * * * *

The said respondents deny that the said Atlantic and Pacific Railroad Company was authorized *by said act or any other act of Congress to locate or construct a line of railroad from the crossing of the Colorado river to San Francisco; they are advised and believe and therefore aver that under said act of Congress the respondent, the Southern Pacific Railroad Company, alone was authorized to construct a line of railroad from the crossing of the Colorado river to San Francisco, and to acquire lands under said act of Congress along and opposite said line.*"

(record in case in 168 U. S., 1, at pages 100, 101, and 102.)

It is further averred in the amended answer in that cause:

"That attached hereto and made a part of this answer, are several exhibits, which respondents ask may be taken *as a part of the answer*, and referring thereto and to each and every allegation, to which said exhibits are pertinent, namely * * * * * * Exhibit B, referred to on page 22 of the answer, being a *statement under date of July 3, 1890*, of the condition on the books of the Land Department of the Southern Pacific Railroad Company of lands involved in said suit, tabulated under the following headings:

Contract No. Contract dated. Purchaser. Address. Fraction. Sec. Twp. Rge. Acres. Sold for. Sur-

veyed or unsurveyed. A. & P. R. R. Co. limits. *S. P. R. R. limits. Main. Branch line*,"
and other information.

(record in 168 U. S., 1, at pages 120, 121.)

The tables of land sales in the *statement of July 3, 1890*, referred to in the answer, *and made a part thereof*, are found in the record in the case in 168 U. S., in the first half of Volume 6, and those tables show that lands estimated to exceed one hundred thousand acres in quantity are situated within the Southern Pacific "main line grant," and within the following townships described in those tables.

Township 6 and 7 north, ranges 11, 12, 13, 14, 15, 16 and 17 west; township 5 north, ranges 8, 9, 10, 11, 12, and 13 west, S. B. M.

The maps showing the Southern Pacific main and branch line grants and their 20 and 30-mile limits, some of which were introduced by each party, are found in the record in that case in Volume 6, being maps 4, 19, 33 and 36.

The decree of the Circuit Court in the case in 168 U. S. annulled all patents issued pursuant to the *act of Congress of July 27, 1866*, and acts amendatory and supplemental thereto (record in 168 U. S., 1, at page 357), and the land tables contained in Exhibit "B" to the answer, show that a large part of the lands within the main line grant were embraced by the patents so vacated.

This ruling of the Circuit Court and the affirmation thereof by the Circuit Court of Appeals *annuling patents under the act of 1866*, was assigned as error by

the Southern Pacific Company upon its appeals (record in 168 U. S., 1, at pages 3175 and 3218).

The claim of the Southern Pacific Company to those lands within its "main line" grant was argued in this court by counsel for appellants and also by counsel for the Government. (See appellee's brief, pp. 122–130.)

Although it was contended by council for the appellants that a considerable part of the lands involved were situated within the main line grant of the Southern Pacific, and for that reason that the lands were held under a different title and could not be controlled by the decisions in 146 U. S., yet it was argued with the same breath that the Southern Pacific Company had not sufficiently alleged and proven a definite location of the road to fully present its claim of title, but the result reached in most cases is because one side or the other has lacked in sufficiency of proofs and it is held that a final adjudication may be had even in a case where the defendant has defaulted.

Last Chance Min. Co. vs. Tyler Min. Co., 157 U. S., 683, 691.

Southern Pacific vs. United States, 168 U. S., 1, 51.

In the opening brief of counsel for appellants in the case in 168 U. S., 1, at pages 120, 121, it is said:

"It appears that some 6,077.80 acres of land involved in this suit (and embraced within the limits of the Branch Line Grant under the Texas Pacific Act of 1871) are also embraced within the grant to the Southern Pacific Railroad Company, made by the 18th section of the Atlantic & Pacific Act of July 27, 1866, for what is called (in land-grant nomenclature) the Main Line of the Southern Pacific—viz., from Mojave to the Needles.

This fact appears from a diagram offered in evidence

by the complainant marked 'Exhibit No. 29' (vide Vol. 6 of Record, Map 31). This diagram was certified by the Commissioner of the General Land Office, January 19, 1889, as "a diagram on file in this office showing "the limits of the grant to the Atlantic & Pacific Rail-"road Company in Los Angeles Land District with the "intersecting limits to the agent to the Southern "Pacific Railroad Company, main and branch lines," and shows the line of the Southern Pacific Main Line Grant, and also by a yellow line the 20-mile limit therefrom on the south. Embraced in this suit, but north of said yellow line (and thus included in the Main Line Grant), are the following lands:

Sections 13, 15 and 17, T. 7 N., R. 11 W	1,920.00 acres
Sections 13, 15 and 17, T. 7 N., R. 12 W	1,920 00 "
Sections 7, 13, 15 and 17, T. 7 N., R. 13 W	2,237.80 "
Total	6,077.80 acres

In the petition for rehearing filed in that case by counsel for appellants, wherein a reconsideration was sought as to lands within the Southern Pacific main line grant and as to the right of the Southern Pacific to select indemnity within the limits of the forfeited Atlantic & Pacific grant, counsel for appellants, apparently forgetting the allegations of their answer, the maps introduced in evidence by both parties, and the decree of the Circuit Court, annulling patents under the act of 1866, and their own assignment of error in the lower courts showing to the contrary, proceed as follows, in their Petition for Rehearing:

"The appellants in the above entitled cause hereby humbly pray that the said case may be reheard, and a reargument therein ordered as to certain classes of land involved in the suit, and which are hereinafter specific-

ally referred to, and that decrees be rendered in respect to such respective classes of land, as hereinafter prayed respectively." (See pages 1 and 2.)

"FIRST."

"AS TO THE LANDS EMBRACED WITHIN THE *INDEMNITY LIMITS* OF SOUTHERN PACIFIC *BRANCH LINE GRANT*, AND THE RIGHT OF THE SOUTHERN PACIFIC RAILROAD COMPANY TO MAKE INDEMNITY SELECTIONS THEREIN *AFTER* THE FORFEITURE OF THE ATLANTIC AND PACIFIC GRANT AND THE RESTORATION TO THE PUBLIC DOMAIN OF THE LANDS INCLUDED THEREIN."

"SECOND."

"AS TO THE CLAIM OF THE SOUTHERN PACIFIC RAILROAD COMPANY, AND THE MORTGAGE TRUSTEES, IN RESPECT TO LANDS EMBRACED WITHIN ITS *MAIN LINE GRANT* UNDER THE 18TH SECTION OF THE ATLANTIC AND PACIFIC ACT OF 1866."

"As a matter of fact considerable amounts of land embraced within the limits of the Main Line Grant are included within the land for the recovery of which by the United States this suit was brought. But these lands were also embraced within the limits of the Southern Pacific Branch Line Grant, and it was not observed by counsel in charge of the defense of this suit that these lands were also covered by the Main Line Grant, until the case was being prepared for argument in the Circuit Court of Appeals. (See page 47.)

This court decided against the claims and contentions of the Southern Pacific Company as to the lands

within the forfeited Atlantic and Pacific grant claimed by it under both its main line and branch line grants, and placed its decision upon the following grounds, which absolutely precluded that company from claiming any of the forfeited Atlantic and Pacific grant under either the act of 1871, 1866 or any other act.

"For the reasons stated, we are of opinion that it must be taken in this case to have been *conclusively adjudicated* in the former cases as between the United States and the Southern Pacific Railroad Company—

1. That the maps filed by the Atlantic and Pacific Railroad Company in 1872 were sufficient, as maps of definite location, to identify the lands granted to that company by the act of 1866.

2. That upon the acceptance of those maps by the Land Department, the rights of that company in the lands so granted, attached, by relation, as of the date of the act of 1866; and,

3. *That in view of the conditions attached to the grant, and of the reservations of power in Congress contained in the act of 1866, such lands became, upon the passage of the forfeiture act of 1886, the property of the United States, and by force of that act were restored to the public domain,* WITHOUT THE SOUTHERN PACIFIC RAILROAD COMPANY HAVING ACQUIRED ANY INTEREST THEREIN THAT AFFECTED THE POWER OF THE UNITED STATES TO FORFEIT AND RESTORE THEM TO THE PUBLIC DOMAIN.

These grounds being accepted as the basis of our decision, the law in the present case is clearly for the United States; *for, as all the lands here in controversy are embraced by the maps of 1872, and, therefore, appertain to the line located by such maps, it must be, for the reasons stated in the former decision, that the United States is entitled, as between it and the Southern Pacific Railroad Company, to the relief given by the decree below.*"

The lands in suit here are also within the thirty-mile

limits of the grant to the Atlantic and Pacific Company and appertain to the line of route as definitely located and established by that company in the year 1872. It cannot be possible, therefore, that the defendants in former suits or their privies can have any right, title or interest in or to any of these lands under the act of July 27, 1866, or act of March 3, 1871, or any other act.

The determination by the court of *every one of the issues* and *claims* of the respective parties in the former suits is necessarily repugnant to and inconsistent with any claim by the defendants here to any of these lands.

In the former suits the Southern Pacific Railroad Company and D. O. Mills and G. L. Lansing, trustees for bondholders, under the mortgage of 1875, were parties defendant. By reason of the death of Lansing, Homer S. King has been substituted as defendant in this suit.

The adjudications are, therefore, binding upon the Southern Pacific Company and D. O. Mills and Homer S. King, trustees.

Kerrison vs. Stewart, 93 U. S., 155, 160.

Corcoran vs. Canal Co., 94 U. S., 741, 745.

Sanders vs. Peck, 87 Fed., 61, 62, 63.

2. DEFENDANT, THE CENTRAL TRUST COMPANY OF NEW YORK, HAVING BEEN INTERESTED IN THE FORMER SUITS, AND HAVING BEEN REPRESENTED THERE BY THE SOUTHERN PACIFIC RAILROAD COMPANY, IS ALSO BOUND BY THE FORMER ADJUDICATIONS.

In the present case defendant, Central Trust Company of New York, is a trustee for the bondholders under a certain mortgage or deed of trust, *secured upon the lands granted to the Southern Pacific Railroad Company by the acts of Congress of July 27, 1866, and March 3, 1871, executed by the Southern Pacific Railroad Company to the Central Trust Company on August 25, 1888.* [rec. 1725.]

The mortgage of 1875 from the Southern Pacific Railroad Company to Mills and Lansing, trustees referred to in the mortgage of 1888, contains the following provision:

"*That all the lands hereinabove conveyed and mortgaged shall be under the sole and exclusive management and control of the said party of the first part* (Southern Pacific Railroad Company), who shall have full power and authority to make contracts for the sale of the same at such prices and on such credit or terms of payment and such other conditions as shall be agreed on by the said parties of the first and second parts, and as shall seem to them best calculated to secure the payment in full of all the bonds issued as hereinbefore provided, until entry or foreclosure by the trustees * * * ." [rec. 1706.]

The mortgage of August 25, 1888, to the Central Trust Company provides as follows: (see p. 1751.)

"All lands granted or conveyed under the acts of Congress hereinbefore referred to and in anywise affected by the provisions hereof, shall be subject to the express provision that if and so long as the bonds issued under and secured by the said indenture or mortgage to D. O. Mills and Lloyd Tevis, dated April 1, 1875, or any thereof shall remain outstanding, *any and all sales made in the manner in said mentioned indenture of mortgage prescribed, shall absolutely and forever release the said lands from any and all liens or en-*

cumbrances of, under or in respect of, this mortgage or the bonds issued thereunder; and if and when all the bonds issued under said indenture of mortgage of April 1, 1875, shall have been fully satisfied and discharged and the lien of such last mentioned indenture of mortgage upon such lands fully released, then the lands, so far as they remain unsold at that time, shall be subject to like provisions in respect to sale, and conveyance and release from the lien of this mortgage as are in said mortgage of April 1, 1875, prescribed in respect to sale and conveyance and release from the lien thereof."

By the very terms of this mortgage the "*sole and exclusive management and control*" of these lands was placed by the Central Trust Company, trustee for the bondholders *in the Southern Pacific Railroad Company*, thereby contemplating and intending that the Southern Pacific Railroad Company should not only go on and secure title to these lands from the United States under the acts of Congress, if possible, and from time to time to sell and dispose of them, but that it should prosecute or defend all suits or other proceedings affecting the *management* and *control* of *these lands*. But the trust deed to the Central Trust Company expresssly provided that it should not cover any lands theretofore "*sold*" [rec. 1745]. Therefore if the trust deed of 1875 was a "*sale*" as now contended, these lands were not covered by the trust deed of 1888.

In pursuance of the power and authority conferred upon the Southern Pacific Railroad Company by the trustees and bondholders to take charge of the *sole* and *exclusive management* and *control* of these lands, the Southern Pacific Railroad Company vigorously defended the former suits brought by the Government to quiet the title of the United States to the lands in con-

troversy, and it is not denied but that the Southern Pacific Railroad Company and the trustees of the bonds were ably represented in those suits. In pursuance of its authority to *sell* the lands, the Southern Pacific Company has for years made contracts of sale to numerous persons.

The principle is well settled that a person although not a formal party of record in an action, if *represented* in such litigation is bound by the judgment to the same extent as if a party of record, and a judgment against a trustee or one acting in a representative capacity binds the *cestui que trust*.

Woods & Woodson 100 F , 515, 519 (C. C. A. 8th).

Kerrison vs. Stewart, 93 U. S., 155, 160.

Van Vechten vs. Terry, 2 Johns. Ch., 197.

Davis vs. Gray, 16 Wall., 203 at p. 232.

Corcoran vs. Canal Co., 94 U. S., 741 at p. 744, 745.

Shaw vs. Railroad Company, 100 U. S., 605, 611.

Maloy vs. Duden, 86 Fed., 402, 404.

In the latter case the court said :

"To give full effect to the principle by which parties are held bound by a judgment and are not permitted to re-examine the controversy decided by it, not only those who are nominal or formal parties are considered but so are all others who are identified in interest with either of the immediate parties, and who actually participate in conducting the controversy. The real principal who is behind the formal party and is actually represented by him throughout the controversy is the real party, and in order to invoke a judgment as an estoppel for or against him, it is always competent to show what the real situation was and what part in promoting or defending the suit was actually taken by

him. 1 Greenl. Ev., 523; Lovejoy vs. Murray, 3 Wall., 1; Robbins vs. Chicago City, 4 Wall., 657. It is upon this principle that it has often been held that the owner of a patent can invoke a former adjudication of its validity as an estoppel in a subsequent suit against an infringing defendant, although the defendant was not a party of record in the former suit. Miller vs. Tobacco Co., 7 Fed., 91; Manufacturing Co. vs. Miller, 41 Fed., 357; David Bradley Mfg. Co. vs. Eagle Mfg. Co., 6 C. C. A., 661, 57 Fed., 985."

In the recent case of Sanders vs. Peck, decided by the Circuit Court of Appeals for the 7th Circuit, 87 Fed., 61, 62, 63, the court held that a person who was represented in a former suit by an *agent* was fully bound by the adjudication. In that case the court said:

"In contemplation of law the appellant was a party to the proceedings and decree, *represented by his attorney Corbin*, of whose unrevoked authority in the premises there is and can be no question, and if the decree so rendered is not to be regarded as having been consented to by the appellant, it is at least binding upon him until set aside, as of course it might be on proof of fraud."

It is, therefore, submitted that there can be no doubt but that the Central Trust Company of New York, trustee for bondholders under the mortgage of 1888, defendant in the present suit, is bound by the prior adjudications equally with the Southern Pacific Railroad Company, and as under the former decision the trustees acquired no interest in the lands, they could not be bona fide purchasers under the confirmation acts of 1887 or 1896.

3. The mortgage by the Southern Pacific Company to Mills and Lansing, trustees, executed in 1875, also provides that the Southern Pacific Company

shall have the sole and exclusive management and control of the lands, and for the reasons given, and upon those authorities these trustees and the bondholders whom they represent would also be bound by the former adjudications even if they had not been parties of record.

Neither the trustees nor the bondholders could have been *bona fide* purchasers under the acts of 1887 or 1896, which confirmed the titles of *bona fide* purchasers as it was adjudicated that they had no title.

4. THE SOUTHERN PACIFIC RAILROAD COMPANY BEING ESTOPPED BY THE PRIOR ADJUDICATIONS FROM DISPUTING THE TITLE OF THE UNITED STATES TO THE LANDS WITHIN THE LIMITS OF THE ATLANTIC AND PACIFIC GRANT, THAT COMPANY AND THOSE IN PRIVITY WITH IT ARE ESTOPPED FROM CLAIMING THAT THE COMPANY HAS SOLD ANY OF THOSE LANDS SINCE THE COMMENCEMENT OF THE FORMER SUITS TO THIRD PERSONS.

The court said, in 168 U. S., at p. 48:

That "a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties *or their privies.* * * * ".

The amended bill of complaint in the case against the Southern Pacific Railroad Company, decided in 140 U. S., 615–619, was filed *Nov. 22, 1889*, and the defendants were then in court. (record 644.)

The answer of the Southern Pacific was filed *December 30, 1889.* (rec. 684.)

The replication of the United States was filed January 25, 1890. (rec. 708.)

The decree of the Circuit Court dismissed the bill in the present case as to about 30,000 acres of land [record 353–362] upon the ground that prior to the commencement of the *present* suit the Southern Pacific Railroad Company had sold or contracted to sell those 30,000 acres.

From this part of the decree the United States has taken a cross-appeal. [record case 495, pp. 4–7.]

These contracts of sale were made by the company to divers persons.

Many of the contracts of sale were made subsequent to the commencement of the former suits (see Table of Land Sales, Appendix 4), including the following:

To W. M. and M. C. Bailey, September 21, 1892; 321.29 acres; agreed price $400. Paid prior to present suit $205.62.

To same parties; same date; 320 acres; agreed price $400; paid $204.80.

To Joseph B. Lippincott, January 18, 1894; 98.64 acres; agreed price $493.20; paid $181.50.

To George R. Lyman, April 11, 1892; 160 acres; agreed price $400; paid $169.60.

To same person; same date; 160 acres; agreed price $400; paid $169.60.

To same person; same date; 160 acres; agreed price $400; paid $169.60.

To same person; same date; 160 acres; agreed price $400; paid $169.60.

To Mrs. Elizabeth Schleismayer, April 12, 1895; 120 acres; agreed price $960; paid $245.76.

To W. M. and M. C. Bailey, January 25, 1892; 320 acres; agreed price $1360; paid $307.20.

To same parties; May 13, 1892; 160 acres; agreed price $400; paid $102.

To same parties; January 25, 1892; 640 acres; agreed price $2720; paid $739.28 [record pp. 272, 284, 286.]

The Southern Pacific Railroad Company, and those in privity with it, being estopped in this suit from denying that the act of Congress of July 6, 1886, forfeited these lands and that by operation of that act they became the *property* of the United States *and were restored to the public domain*, it cannot lie in the mouth of the Southern Pacific to show in this suit, that after the commencement of the former suits they sold or conveyed any interest in these lands to third persons, as they and their privies are all bound and estopped by the prior adjudications.

The principle is well settled that a third person who purchases a right or property *under litigation*, from a party to a suit, is bound by the judgment entered in such suit to the same extent as if a formal party, and in contemplation of law such purchaser is represented in such suit by the party from whom he has purchased.

Murray vs. Ballou, 1 Johns. Ch., 566.

Whiteside vs. Hazelton, 110 U. S., 296, at p. 301.

Union Trust Co. vs. Southern Co., 130 U. S., 565, 571.

It is, therefore, submitted that the effect of the former adjudications was to establish the title of the United States to these lands as against the Southern Pacific Railroad Company and the purchasers who are in privity with it, and that the company defendant here is estopped from claiming that any third person has acquired any interest in the property since the commencement of the former suits.

5. IN ANY EVENT, EXECUTORY CONTRACTS OF SALE MADE BY THE SOUTHERN PACIFIC COMPANY CAN HAVE NO VALIDITY AS TO ANY PAYMENTS MADE AFTER NOTICE TO THE PURCHASERS.

The 30,000 acres of land, as to which the decree of the Circuit Court dismissed the bill, were contracted to be sold to divers persons by the Southern Pacific Company upon *executory contracts*, upon which one-fifth of the purchase price was paid at date of contract, and the balance of the purchase price was payable in equal amounts, running through a period of years. [rec. 272–310.]

It appears from the evidence that one or more payments of principal had been made upon each of the contracts, at time of commencement of present suit, and on most of them there had been payments made of interest due upon the unpaid purchase price.

The tabulated statement of sales, showing names of purchasers, description of land, dates of sales, purchase price and amount paid, furnished by the Southern Pacific Company (Appendix 4) shows *that the greater part of the purchase price*, in each contract of sale, *remained unpaid at the time of the commencement of the present suit* as well as when the former suit was commenced. The bill in the present suit was filed May 14, 1894, [rec. 8–27], *and subpœna served* July 23, 1894. [rec. 40, 41].

In order to constitute a purchase there must be a payment, and the purchase is not completed excepting as to the payments actually made prior to notice.

In *Lytle* vs. *Lansing*, 147 U. S., 59, at p. 70, the court said that it was "a settled rule in equity that a purchaser without notice to be entitled to protection must not only be so at the time of the contract or conveyance, but at the time of the payment of the purchase money." Citing numerous authorities.

Applying this principle to the contracts to purchase in the present case, and it appears that as to whatever payments have been made after May 14, 1894, cannot operate to affect the legal or equitable rights of the United States to this land in any event.

And that principle applies with equal force to payments made subsequent to commencement of former case on September 29, 1889.

The legal title to these lands remained in the Southern Pacific Company (if not in the Government), subject to the payment of the balance of the purchase price, and an equitable right remained in the purchaser to the extent of payments made prior to the commencement of this suit or of notice.

Williams vs. U. S., 138 U. S., 514–516.

Jennison vs. Leonard, 21 Wall., 302, at p. 309.

1 Story's Eq. Jur., 396.

2 Pomr. Eq. Jur., Secs. 688, 1048.

In any event, therefore, the United States was entitled to a decree for the interest which the Southern Pacific Railroad Company held in these tracts at the time this suit was commenced, and the decree of the Circuit Court in dismissing the bill as to these lands was erroneous.

The amendatory act of Congress of Feb. 12, 1896 (see Appendix), expressly provided that where less than the

Government price had been paid to the railroad that, in order to procure title from the United States, *the balance should be paid to the Government.*

It was optional with the Government to join or not to join the purchasers as parties defendant in this case.

The right was with the Government to pursue the railroad company alone for the interest claimed by it.

Williams vs. U. S., 138 U S., 514, 516.

Furthermore, the acts of 1887 and 1896 extend protection to the *bona fide purchasers, not to the railroad.*

By reason of these acts, it became a legal duty of the Government to execute proper conveyance to such purchasers.

This is required by Section 2 of the act of March 2, 1896, by Section 4 of the act of March 3, 1887, and by the act of February 12, 1896.

The Government, therefore, has a right to annul the wrongful claim of the railroad, in order to convey a full and unclouded title to the purchaser.

U. S. vs. Hughes, 11 How., 552, 568.

Hughes vs. U. S., 4 Wall., 232.

Curtner vs. U. S., 149 U. S., 662, 672, 673.

U. S. vs. Bell, etc., Co., 128 U. S., 362, 368.

There is not a hint or suggestion in the acts of Congress that the Government was to give the purchasers a *greater estate or interest than they had purchased*, yet the Circuit Court erroneously adjudged that the Government had no interest in these lands.

The effect of the decree of the Circuit Court is to give the lands to the railroad.

6. The Circuit Court by its decree erroneously

adjudged that the decree shall not "*cancel or vacate any patent issued by the United States to the said Southern Pacific Railroad Company for lands sold by it to a bona fide purchaser.*" (record 362.)

The purpose of this suit was to *determine* as between the United States and the defendants, the title to the lands sued for, and the effect of the decree is to leave that matter undetermined.

Such a provision as this, refusing to determine the rights of the parties, was criticised by the court in Southern Pacific Railroad vs. United States, 168 U. S., 65, 66.

It does not appear from the evidence that any lands patented to the railroad have been sold to bona fide purchasers, except as to the 30,000 acres above referred to, which the court adjudged had been sold and as to which adjudication it is contended the court erred.

The Circuit Court gave the Government a decree with a string attachment which leaves open as to all the land the very question sought to be determined.

The Government was entitled to a decree for all of the lands sued for.

This point is more fully discussed in the "Eighth Point" of the brief.

In conclusion of the brief upon *res adjudicata* it is submitted that the claims here made to these lands by the Southern Pacific Railroad Company and by Mills and King, trustees under the mortgage of 1875, and Central Trust Company, trustee under the mortgage of 1888, have been finally and conclusively determined against them by the former adjudications.

And as it appears that as to the 30,000 acres contracted to be sold, upon which only a partial payment has been made, that the Southern Pacific Company still wrongfully holds the legal title to these lands and all equitable rights in them, except as to the portion of the purchase price paid, and that the Government is entitled to a decree against the defendants for these lands, *and for the interest which the defendants have in them* The decree should be affirmed upon the appeal of the Southern Pacific Company and reversed upon the appeal of the Government with direction to enter a decree as indicated.

If these views find support in the opinions of your Honors, it will be unnecessary to consider any aspect of the case upon the merits.

Second Point.

UPON THE MERITS.

NEITHER THE SOUTHERN PACIFIC GRANT, MADE BY SECTION 18 OF THE ACT OF CONGRESS OF JULY 27, 1866, OR JOINT RESOLUTION OF JUNE 28, 1870, HAD ANY OPERATIVE EFFECT UPON ANY OF THE LANDS WITHIN THE THIRTY-MILE LIMITS OF AND APPERTAINING TO THE ATLANTIC AND PACIFIC GRANT.

The charter of the Atlantic and Pacific Railroad (Act of July 27, 1866), in Section 1, lays down the route as follows:

"Beginning at or near the town of Springfield, in

the state of Missouri, * * * thence to the town of Albuquerque, on the river Del Norte, and thence by way of Agua Frio, or other suitable pass, to the headquarters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing, and thence by the most practical and eligible route to the Pacific."

The grant of lands to the Atlantic and Pacific in the state of California, contained in section 3 of the act, was of every alternate section for twenty miles on each side for lands in place, and ten miles further on each side within which the company was authorized to select indemnity, making thirty miles on each side, or the alternate sections for sixty miles in width altogether.

The act provided in section 6, that a withdrawal should be made for the company.

Section 18 of the act provided as follows:

"Section 18. *And be it further enacted*, That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to *connect with the said Atlantic & Pacific Railroad*, formed under this act, *at such point near the boundary line of the state of California, as they shall deem most suitable for a railroad line to San Francisco;* and shall have a uniform gauge and rate of freight or fare with said road, and, in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided; and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic & Pacific Railroad herein provided for."

The Southern Pacific Railroad Company, which was authorized to connect with the Atlantic and Pacific Railroad "near the boundary line of the state of Cali-

fornia," was a corporation created in December, 1865, under the laws of the state of California, and the articles of incorporation of the Southern Pacific Railroad Company authorized that company to construct a single line of railroad, described in the articles as follows:

"from some point on the Bay of San Francisco, in the state of California, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles and San Diego, to the town of San Diego; thence eastward through the said county of San Diego to the eastern line of the state of California." [rec. 527.]

The act of the Legislature of the state of California, approved November 29, 1865, by authority of which the Southern Pacific Railroad Company was organized, provided in section 18, as follows:

" * * * Nothing in this act shall be so construed as to confer any powers on such companies to so change their road as to avoid any point named in their said articles of incorporation, except as provided in section 17, subdivision 7, of this act."

And by subdivision 7, of section 17, it was provided:

"But no such change shall vary the general route of said road as contemplated in the articles of association of said company."

The Charter of the Atlantic and Pacific Company did not fix the point upon the Pacific where that company was required to make its western terminus. The last point of latitude mentioned in the charter was the thirty-fifth parallel, and from thence the company was required to locate to the Pacific "*by the most practicable and eligible route.*"

The Atlantic and Pacific Company explored the routes from the Colorado to the Bay of San Diego, and

also from the Colorado to San Pedro, and also from the Colorado by the Soledad Pass to the Pacific ocean at San Buenaventura, and eventually fixed upon the latter route, as the most practicable and eligible, and filed maps of definite location upon that line in 1872, which were approved by the Government that year.

From San Buenaventura the company proceeded to locate its route and file maps thereon to San Francisco, but the Government rejected that part of the line between San Francisco and the Pacific ocean at San Buenaventura, and which action this court said, in the former cases in 146 U. S., 570, was entirely proper, for that the land grant of the company was exhausted when it reached the Pacific ocean at Ventura.

The charter of the Southern Pacific Railroad Company authorized the construction of the line of road of that company *from San Francisco* through the county of *Los Angeles to San Diego,* and thence east to the Colorado, and such line might have intersected the Atlantic and Pacific Railroad at or near San Buenaventura, the western boundary of the State, or near San Pedro, also on the western boundary, or at San Diego, near the southern boundary, depending upon the point where the Atlantic and Pacific might reach the coast.

That Congress contemplated and intended that the connection of the Southern Pacific with the Atlantic and Pacific should be made at or near one of these points, and not upon the Colorado river at Needles, is made certain from the following considerations:

(1) That the line down the coast prescribed in the

charter of the Southern Pacific Company was the only line of route which that company was authorized to construct upon which could have intersected and connected with the Atlantic and Pacific Railroad, and the charter powers of the Southern Pacific must have been known to and understood by Congress.

(2) The laws of California forbade the Southern Pacific Company from constructing a railroad upon any other line than that described in the charter or articles of incorporation.

(3) The purpose of Congress in incorporating the Atlantic and Pacific Company, and providing for its construction with the aid of an enormous land grant, was, as expressed in the act, "to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific Coast," for Governmental and other public purposes. Congress had already provided for the construction of a railroad from Omaha to San Francisco by the Union Pacific and Central Pacific Railroad. Therefore, the purpose was to construct another railroad to the Pacific at some other point, and the contention of counsel for the Southern Pacific that that company was authorized to intersect the Atlantic and Pacific Railroad at *Needles on the Colorado* and *parallel* the Atlantic and Pacific Railroad for two hundred and fifty miles in California, would operate to wholly *defeat* the purpose of Congress, to secure the construction of the Atlantic and Pacific Railroad to the Pacific Coast, with a Southern Pacific branch from the connection to San Francisco.

(4) The contention that Section 18 authorized the Southern Pacific Company to construct from San Francisco via Mojave, to the Colorado at Needles, is repugnant to and inconsistent with the settled principle that where a grant of lands is made by Congress to aid in the construction of a railroad, the railroad must be constructed upon the *nearest practicable route*, and a connection with the Atlantic and Pacific Railroad at or near Ventura where it was located, near the western boundary of the state, would be more than two hundred and fifty miles shorter than the long and devious route by Mojave to the Colorado river.

The Southern Pacific Railroad Company never filed any map of general route or of definite location, and never constructed any railroad upon the line prescribed in its charter, which it was authorized to build upon at the time of the passage of the act of July 27, 1866, and therefore has never acquired or earned any lands, or rights to lands, under that act.

Notwithstanding the plain provisions of the laws of California and the route fixed in the charter of the Southern Pacific Company, and the existing grant to the Atlantic and Pacific Railroad from the Colorado to the Pacific, and the settled principles governing the construction of such grants, the Southern Pacific Company illegally and improperly filed, or offered to file, in the Interior Department, on January 3rd, 1867, a map of its proposed *general or preliminary route* for a line of railroad *from San Francisco, via Mojave, to the Colorado river at Needles.*

Upon filing this map in 1867, it was thereafter contended by the Southern Pacific Railroad Company, for more than three years, that the route was authorized by the act of Congress of 1866; but *three successive Secretaries of the Interior*, viz., Secretaries Browning, Cox and Delano, adhered to their respective rulings and decisions, that the map of 1867 was upon a route wholly unauthorized by the charter of the Southern Pacific Company by the laws of California, and not contemplated by the act of Congress of 1866, and that the lands upon the line of that route theretofore withdrawn should be restored to the public domain and to entry.

At different times during this period of more than three years, the Southern Pacific Railroad Company from time to time succeeded in securing from the Interior Department orders suspending the rejection of the map and restoration of the lands, and as often thereafter the Secretary of the Interior would set aside the suspensions and order the lands restored.

A chronological statement of these various orders and decisions of the Secretaries of the Interior, from 1867 down to 1870 inclusive, are set forth in the appendix hereto, in "Table of Dates, appendix (3)."

That the map of 1867 was a map of general route, or of preliminary survey, and not a map of *definite location*, is made certain by inspection of the certificate of the officers of the Southern Pacific Railroad Company upon the map itself, in the following words:

OFFICE OF THE SOUTHERN PACIFIC RAILROAD COMPANY, SAN FRANCISCO, CALIFORNIA.

"We hereby certify that this map indicates the route

of the *preliminary survey* of the Southern Pacific Railroad, and as such was adopted and approved by a vote of the Board of Directors of the Southern Pacific Railroad Company at a meeting held at their office in the city of San Francisco, on the 22nd day of September, *A. D.* 1866.

"In witness whereof we have hereunto set our hands and seals this 29th day of September, *A. D.* 1866.

"(Signed) A. G. PHELPS,
"*President Southern Pacific Railroad Company.*

"CHARLES N. FOX,
"*Secretary pro tem. Southern Pacific R. R. Co.*

"WILLIAM I. LEWIS,
"*Chief Engineer Southern Pacific R. R. Co.*"
[record 1400.]

This map of general route was received on January 3, 1867, by the Secretary of the Interior, and transmitted to the Commissioner of the General Land Office.

On March 19, 1867, Browning, Secretary of the Interior, ordered a withdrawl of lands within thirty-mile limits upon the map of 1867, *but expressly reserved future consideration as to conflict with routes of other railroads.* [rec. 1273, 1274.]

Secretary of the Interior Browning, in his decision of July 14, 1867, upon full consideration and argument, decided that the map of 1867, offered by the Southern Pacific Railroad Company, was wholly unauthorized, and ordered the lands appertaining to that line of road to be restored to the public domain. [record 1275, 1280.]

The Southern Pacific Railroad Company brought the matter up again before Secretary of Interior Cox, on

November 2, 1869, and the decision there rendered was against the validity of the map. [record 921, 923.]

On November 11, 1869, the Southern Pacific Company got a re-hearing of the matter again before Secretary Cox, and in his decision he said:

"I am clearly of opinion that when there is a grant by Congress of land to a railway company organized under a state law, for the purpose of constructing a road, the lands can only be withdrawn upon the authorized route of such road. Congress did not assume to confer upon an existing company in California the right to construct a road not authorized by its articles of association or to diverge from the route which they prescribe."

"It would be a singular anomaly if Congress should empower a state corporation to do an act expressly forbidden by a law creating it, which the state had the constitutional power to enact. The withdrawal was, I am satisfied, not warranted by the act of July 27, 1866."

"I now return my decision of the 2nd inst. and you will instruct the local land officers to restore the lands withdrawn in 1867 to their former status after sixty days' public notice by advertisement." [record 889, 892.]

Secretary of the Interior, Delano, in his decision of May 9, 1873, adhered to the decisions of his predecessors, that the Southern Pacific Railroad Company was not authorized to construct any line of railroad upon the route shown by the map of 1867 [record 1301, 1305], and in that decision said:

"By the act of July 27, 1866 (14 Stat., 292), the Southern Pacific Railroad, a company incorporated under the laws of the state of California, was authorized to connect with the Atlantic & Pacific Railroad at such point near the boundary line of the state of Cali-

fornia as it should deem most suitable for a railroad line to San Francisco and was granted to aid in its construction every alternate section of public land. * *

"This Southern Pacific Company located its line and filed a map of the same in the Interior Department January 3, 1867, and thereupon on the 22nd day of March, 1867, a withdrawal was directed of the odd sections that would inure to the road. Subsequently it was shown to the satisfaction of Secretary Browning that the location made by the Southern Pacific was not in accordance with the law of California, under which the company was created, and he, on the 14th of July, 1868, revoked his former order of withdrawal and directed a restoration of the lands withdrawn. * * * Mr. Secretary Cox, Nov. 2, 1869, affirmed the decision of his predecessor that the Southern Pacific was improperly located. * * * On the 15th of December, 1869, at the request of Senator Howard, chairman of the senate committee on the Pacific Railroad, *and upon a suggestion that legislation was contemplated*, he suspended his order of restoration made on the 2nd of November, as aforesaid."

Secretary Delano referring to the passage of the joint resolution of June 28, 1870, then says:

"*It operates as a grant to the road in praesenti and is the first authority given to the company to construct its road upon the line selected. It makes such grant to the same extent and for the same amount and subject to all the conditions and restrictions specified in the third section of the act of July 27, 1866. One of those conditions is that the grant shall not operate upon any lands reserved at the time the line of the road was designated by a plat filed in the office of the Commissioner of the General Land Office.*"

On April 4, 1870, the Southern Pacific Railroad Company became satisfied that the map of 1867 could not be imposed upon the Government, and that it could not without further legislation from the Legislature of

Califorina and from Congress connect with the Atlantic and Pacific Railroad upon the *eastern* boundary of the state; and thereupon procured the passage of an act of the Legislature of California, approved April 4, 1870, which provides as follows:

"Said company (Southern Pacific Railroad Company), its successors and assigns, are hereby *authorized and empowered to change the line of its railroad so as to reach the eastern boundary line of the state of California* by such route as the company shall determine to be the most practicable; * * * * hereby confirming to and vesting in said company, its successors and assigns, all the rights, privileges and franchises, power and authority conferred upon, granted or vested in said company by said acts of Congress, and any acts of Congress which may be hereafter enacted." (see Appendix.)

Armed with this authority from the state the Southern Pacific Railroad Company then procured the passage of a joint resolution by Congress approved June 28, 1870, which provided as follows:

"Be it resolved, by the Senate and House of Representatives of the United States of America, in Congress assembled, that the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven, and upon the construction of each section of said road in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the Com-

missioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminus to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, *expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act.*"

Fifteen years after the passage of this joint resolution, and in the year 1885, the Southern Pacific Railroad Company constructed a line of railroad from Mojave to the Colorado river at Needles, somewhat upon the line of route shown by the map of 1867, but varying from it at points a distance of more than thirty miles, and getting entirely outside of the thirty-mile limits, as shown by the map of 1867.

The Southern Pacific Company filed maps in the Interior Department in 1885, showing its line of railroad between Mojave and Needles as definitely located and constructed [rec. 1158, 1159], and the land grant of the Southern Pacific was adjusted according to these maps of constructed road, which were taken by the company and by the Interior Department as maps of definite location, as no other maps were filed by the Southern Pacific Company.

Case of Southern Pacific Railroad, 25 L. D., 223, 229.

The Southern Pacific maps filed in 1885 from Mojave to Needles were the first and only maps of definite location between those points filed by that company.

The map of 1867 was, as before shown, certified by the company to be a map showing *preliminary survey of a proposed route*, and it was filed as such and treated as such by the Government.

As all the lands involved in this case lie south and east of Mojave, it is unnecessary to refer to any other maps of the Southern Pacific main line *definite location* than those sections between Mojave and the Colorado river.

These several sections of the map of definite location all contain upon their face certificates of the officers of the Southern Pacific Railroad Company certifying that the map shows the true and correct location of the Southern Pacific Railroad, and the certificate upon section *eleven* [rec. 1158], which is similar to the others, is as follows:

"Map and Profile of Section No. Eleven of the Southern Pacific Railroad and Telegraph Line."

"Commencing at a point at the end of the 141.61 mile on the line of said railroad southeasterly from the intersection of the Southern Pacific Railroad with the San Joaquin Valley Branch of the Central Pacific Railroad, said point of commencement being in the northeast quarter of section 17, township 11 north, range 12 west, San Bernardino Meridian, and running thence in an easterly direction forty miles to a point in the northeast quarter of section 6, township 10 north, range 6 west, San Bernardino Meridian"

"I, George E. Gray, chief engineer of the Southern Pacific Railroad Company, certify *that this is a correct map of the forty-mile line of the said road, showing the line in connection with the lines of the public survey*, between the end of section number ten of said railroad * *

and a point on said road forty miles easterly therefrom * * showing the radii and lengths of curves and courses of tangents, with full and correct delineations of all topography within three thousand feet of said line on either side thereof, and with other topographical facts controlling or influencing the location of said line, or showing reasons therefor, and giving the crossings of all streams. * * *

"GEORGE EDWARD GRAY,

"*Chief Engineer of the Southern Pacific Railroad Company.*"

"Subscribed and sworn to before me, William T. Sesnon, Clerk of the Superior Court in and for the city and county of San Francisco, state of California (the same being a court of record), this 26th day of December, *A. D.* 1884, as witness my hand and seal of said court.

"WILLIAM T. SESNON,

"*Clerk of the Court Aforesaid.*"

"*State of California,*
City and County of San Francisco. } *ss.*

"George E. Gray, of San Francisco, in said county and state being duly sworn, deposeth and says, that he is the chief engineer of the said railroad from the end of section number ten of said railroad to a point forty miles easterly therefrom, as set forth above, being for the eleventh section of forty miles as shown by the line of route in connection with the lines of the public surveys on this map, that it has been completed and equipped as required by law, *and that this line of route shows the correct location of the said railroad.*

"GEORGE EDWARD GRAY,

"*Chief Engineer of the Southern Pacific Railroad Company.*"

"Sworn and subscribed this 20th day of December, A. D. 1884, before me, Charles J. Torbert, Notary Public in and for said city and county of San Francisco, state of California."

"OFFICE OF THE SOUTHERN PACIFIC RAILROAD COMPANY, SAN FRANCISCO, CAL.

"It is hereby certified that George E. Gray is the

chief engineer of the Southern Pacific Railroad Company *and that the location of the road as represented on this map is correct and approved by the Company*, and also that the said portion of the said road has been completed and equipped in all respects as required by law.

"CHAS. CROCKER,
"*President of the Southern Pacific Railroad Company.*
"Attest: [SEAL.] JOSEPH L. WILLCUTT,
"*Secretary of the Southern Pacific Railroad Company.*"

[Endorsed on the map] "Department of the Interior. L. & R. R. Div. Received Jan 7, 1885."

The act of July 27, 1866, which governs the terms and conditions of the Southern Pacific grants, *provides by section 6 for the filing of a map of general route* and by section 3 *for the filing of a map of definite location.* On filing the map of general route a temporary withdrawal was to be made to preserve the lands for the company, but no rights attached to any particular lands. On filing map of definite location the grant took effect. The Southern Pacific Railroad Company, as well as the Interior Department, recognized that there was a wide difference between a map of general route and a map of definite location, and it was held in the Interior Department, in several well considered cases, that no rights attached in the Southern Pacific Railroad on filing its map of general route. See

Southern Pacific Railroad 25, L. D., 223, 229.

Southern Pacific Railroad vs. McWharter, 14 L. D., 610, 612.

Morgan vs. Southern Pacific Railroad, 11 L. D., 582.

This court clearly pointed out that the Southern

Pacific grant, governed by the act of 1866, requires by section 6 a map of *general* route, and by section 3 one of *definite location*, and that the former confers no rights to lands.

U. S. vs. Southern Pacific, 146 U. S., 570, 597, 599.
Southern Pacific vs. U. S., 168 U. S., 1, 42.

Southern Pacific Company Adopts Line of Definite Location.

Before filing maps of definite location upon the main line grant above set forth, the Southern Pacific Railroad Company, by its Board of Directors, determined upon and adopted that line of definite location. This was done by a series of resolutions of the Board of Directors. [rec. 1805, 1810.]

Southern Pacific Maps of Definite Withdrawal (Main Line).

As each section of the definite location of the Southern Pacific main line was filed in the General Land Office, maps of *definite withdrawal* were prepared by that office and transmitted to the several local United States land offices in California, ordering the lands to be reserved within the twenty and thirty-mile limits, showing that line with the twenty and thirty-mile limits of the land grant adjusted thereto.

On August 2, 1878, the Secretary of the Interior decided in a number of cases, and notably in the case of Samuel Tome, that lands settled upon prior to the passage of the joint resolution of June 28, 1870, were excepted out of the Southern Pacific grant. [rec. 897.]

A comparison of the map of general route of 1867 with the map of definite location of 1885, will show that those lines of route were widely divergent. At township 17 south, Mount Diablo base, the routes are ten miles apart. At township 28 south, the lines are about twelve miles apart. In San Bernardino county at ranges 12 and 13 east, S. B. Meridian, *the lines of route are more than thirty miles apart and at that point for a considerable distance the line of definite location is wholly outside of the thirty-mile limits shown by the map of general route of 1867.*

In the recent case of Southern Pacific Railroad Company, 25 L. D., 223–229, the Secretary of the Interior formally accepted the Southern Pacific Railroad between Mojave and Needles and in that decision said:

"The map of 1867 was not filed as a map of definite location, but rather as a map of general route. This department had held that the route indicated upon said map was not possible under its state charter, and, therefore, revoked the withdrawal order upon said route. The passage of the resolution was, therefore, to permit the construction along the general route indicated, and not to restrict the company to the exact location shown upon said map."

"This department has never treated the line of 1867 as the definite location of the road, but has adjusted the limits of the grant to the road actually constructed."

That Congress did not make a grant to the Southern Pacific from Mojave to Needles in the act of 1866 is not a question of "*corporate capacity*" as argued by defendants. Of course, questions of abuse of corporate powers and franchises can ordinarily be raised only in direct proceedings, but this is a question of *construction*

of legislation. The question here is as to whether Congress made a grant upon that line by the act of 1866, and we think we have fully shown from the language employed by Congress, from the charter of the company, which determined what line the company could build upon, from the act of the legislature, and Interior Department decisions for many years, and from the acts of the company, that it was never contemplated that the act of 1866 made such a grant, but that the first and only grant made upon the route shown by the map of 1867 was made by the joint resolution of 1870, and that grant excepted from its operation all lands *reserved* and *claimed* prior to the Southern Pacific's definite location.

(2) Congress intended in Section 18 of the act of July 27, 1866, that the Southern Pacific should connect with the Atlantic and Pacific upon the western or southern boundary of California upon the chartered route of the Southern Pacific *from San Francisco through Los Angeles county to San Diego.*

The route laid down in the charter of the Southern Pacific Company is deemed to be read into the Congressional act making the land grant to that company, as it is conclusively presumed that Congress had such line of route in contemplation.

In Railway Co. vs. Alling, 99 U. S., 463, at p. 474, the court said, referring to a grant to a state corporation:

"Of what the company had done, prior to the passage of the act of 1872, towards effecting the objects of its incorporation, Congress, it is fairly to be presumed, was not uninformed. It was aware, we must also pre-

sume, of the routes designated in the charter of the company, for the main road and its several branches, all so connected as to constitute, when completed, an extended railway system for that entire region. That Congress was so informed is quite clearly indicated by the terms employed in the act of 1872. *That act must, therefore, receive the same construction which would be adopted had it contained a full or detailed description of the routes of the main line and branches.*"

In Washington Railroad vs. Cœur D'Alene Railway, 160 U. S., 77 at p. 99, the court said:

"We are unable to accept such a view of the law, but concur in the conclusion of the court below that the language of the act of Congress, under which both parties claim, wherein it provides that 'the right of way through the public lands of the United States is hereby granted to any railroad company duly authorized under the laws of any state or territory, which shall file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of a hundred feet on each side of the central line of said road,' *plainly means that no corporation can acquire a right of way upon any line not described in its charter or in its articles of incorporation;* that it necessarily follows that no initiatory step can be taken to secure such right of way by the survey upon the ground or otherwise; that until the power to build the road upon the surveyed line was in a proper manner assumed by or conferred upon the plaintiff company, its acts of making surveys were of no avail; and that, so far as the conflicting rights of the parties to this controversy are concerned, the status of the plaintiff is the same as if its survey of October 28, 1885, had not been made."

These decisions of the court are in harmony with those of Secretaries of the Interior, Browning, Cox and Delano, before mentioned, in which they rejected the Southern Pacific map of 1867 as being upon an unauthorized route.

(3) Congress intended in section 18 of the act of 1866 that the Southern Pacific should connect with the Atlantic and Pacific by the *shortest practicable route* from San Francisco.

The Atlantic and Pacific Railroad was on or about the thirty-fifth parallel of latitude on the Colorado river, and from thence it was required to construct to the coast. That, of course, under the act, would have to be by a near and practicable route.

The direct route of the Southern Pacific, from San Francisco to Ventura, where the western terminus of the Atlantic and Pacific was in fact fixed, was more than *two hundred and fifty miles shorter* than the route *via* Mojave to Needles.

It has long been settled that where the termini of a land-grant-aided railroad are mentioned in an act of Congress, the railroad must be constructed upon the *shortest practicable route*, and if there is an unnecessary deviation it will be rejected.

St. Paul R. vs. Northern R., 139 U. S., 1.

U. S. vs. Northern Railroad, 152 U. S., 284, 292.

U. S. vs. S. P. R., 146 U. S., 570 at page 596.

(4) The grant to the Southern Pacific by the joint resolution of June 28, 1870, as before mentioned, provided that it was subject to the "*conditions and restrictions provided for in the 3rd section of said act*," referring to the act of July 27, 1866, and by Section 3 of the former act it was provided that the grant was of those lands only, "*not reserved, sold, granted or otherwise appropriated and free from preemption or other claims or rights at the time the line of said road is designated by a plat thereof* * * * ."

And it was further provided, in section 3:

"That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been granted by the United States, so far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act."

Both of these provisions in section 3 of the act excluded from the Southern Pacific grant all the lands pertaining to the Atlantic and Pacific Road, not only because they were reserved for and claimed by the Atlantic and Pacific, but because they were upon the general lines of both the Atlantic and Pacific and Southern Pacific roads.

United States vs. Southern Pacific, 146 U. S., 570, at p. 605.

The Atlantic and Pacific grant had been located by approved maps of definite location in 1872, and the maps filed by the Southern Pacific under the joint resolution of 1870, were filed in 1885.

Independent of the express provision of the joint resolution of 1870, that the grant should not operate upon lands previously granted, reserved or claimed, the authorities are altogether in support of the view that the grant of 1870 cannot be antedated as of the date of the act of July 27, 1866, as contended by counsel for the Southern Pacific.

In the United States vs. Southern Pacific Railroad, 146 U. S., 570, it was contended by counsel for the Southern Pacific that Section 23 of the act of Congress of March 3, 1871, which authorized the Southern Pacific Railroad Company to construct a railroad from

Mojave via Los Angeles to Yuma, "*with the same rights, grants and privileges and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July 27, 1866* * * *," was to be construed as having taken effect *on July 27, 1866*, and as an amendment of that act.

Considering this contention of counsel the court said (146 U. S., 595):

"It matters not that the act of 1871 in terms purports to bestow the same rights, grants and privileges as were granted to the Southern Pacific Railroad Company by the act of 1866. That merely defines the extent of the grant and the character of the rights and privileges; it does not operate to make the latter grant take effect by relation as of the date of the prior grant, and thus subject the grants to the two companies to the rule controlling cotemporaneous grants, as established by *St. Paul & Sioux City Railroad vs. Winona & St. Peter Railroad*, 112 U. S., 720 and *Sioux City & St. Paul Railroad vs. Chicago, Milwaukee, etc., Railway*, 117 U. S., 406. *Even if Congress had in terms expressed an intent to that effect in a subsequent act, it was not competent, by such legislation, to divest the rights already vested in the Atlantic and Pacific Company.*"

In St. Paul Railroad vs. Northern Pacific Railroad, 139 U. S., 1, the facts were that by the act of Congress of March 3, 1857, a grant was made to Minnesota to aid in constructing a railroad from Stillwater by St. Paul to Big Stone Lake, and thereafter by the act of March 3, 1865, Congress enlarged the grant of 1857 and for its terms and conditions referred to the former act of 1857.

In the meantime, and in 1864, Congress made a grant through the same territory to the Northern Pacific

Railroad and the court held that the act of 1865 did not relate back to the act of 1857, but was to be treated as a *new grant*, and the court said at page 15:

"The act of March 3, 1865, as above stated, is a new grant referring to but distinguishable, and distinct from that made by the act of March 3, 1857,"

And the court further said:

"It is, however, contended in answer to this position of an earlier grant to the plaintiff that the acts of March 3, 1865, and March, 3, 1871, are to be treated not as distinct acts but simply as amendments to the act of March 3, 1857, and to be given an operation as of that date. We do not assent to this position. Though the act of March 3, 1865, by its new and additional grants, amended the previous act of 1857, its operation upon any lands previously reserved to aid in any work of internal improvements were expressly restrained. What was reserved before, remained reserved afterwards."

The case of United States vs. Northern Pacific Railroad, 152 U. S., 284, is strongly in point.

In that case the act of Congress of 1864 granted to the Northern Pacific Railroad lands in aid of the *main line* of that railroad "from Lake Superior * * * to some point on Puget Sound, with a branch via the valley of the Columbia river to a point at or near Portland in the state of Oregon, leaving the main trunk line at the most suitable place not more than 300 miles from its western terminus."

The joint resolution of Congress of May 31, 1870, authorized the Northern Pacific Railroad to construct its *main line* down the Columbia river to Puget Sound with its *branch line* from a point across the Cascade mountains to Puget Sound with the same grant of lands as was made by the act of 1864.

In the meantime Congress made a grant to the Oregon Railroad through the territory covered by the Columbia-river line, and the court held that the joint resolution of 1870, while it authorized the construction of the *main line* down the Columbia river to Puget Sound, was to be considered as a *new grant* and subject to the grant to the Oregon Company, made by the act of Congress of May 4, 1870, and the court said at page 294:

"Undoubtedly this resolution (May 31, 1870) gave authority to locate and construct a main road via the Columbia river valley to Puget Sound A road so located and constructed would or might have passed the city of Portland. But if, as the company now insists, the act of 1864 gave ample authority to locate and construct a road extending from Lake Superior to Puget Sound along the valley of the Columbia and by the way of Portland or its vicinity, the resolution of 1870 was entirely unnecessary in so far as it gave authority to the company to locate and construct its road through the Columbia river valley to some point on Puget Sound. We cannot agree that this resolution is to be held in this respect as simply a recognition by Congress of an existing right in the company to locate and construct a road from Portland to Puget Sound with the right to obtain lands in aid thereof, as provided in the act of 1864. On the contrary, it should be regarded as giving a subsidy of land in aid of the construction of a *new road*, not before contemplated, that would directly connect Portland and its vicinity with Puget Sound."

In any possible view of the case the benefits which the Southern Pacific Company received by the passage of the joint resolution of June 28, 1870, were accepted and taken, subject to the express condition that the grant should not operate upon any lands previously

granted, sold, reserved or otherwise appropriated, and free from *claims* at the time of *the definite location of the road.*

By the terms of the resolution of June 28, 1870, therefore, the Southern Pacific "main line grant" took effect through the lands in controversy in the year 1885, when it filed its map of definite location, and by the terms of that grant the lands then granted, reserved, otherwise disposed of, and *claimed* were excepted out of the Southern Pacific grant which included the lands reserved by the accepted Atlantic and Pacific maps filed in 1872.

In conclusion of this point of the brief, we submit that the following propositions are established beyond any question:

First. That the resolution of June 28, 1870, was a new and distinct grant, and when passed, these lands had been granted to the Atlantic and Pacific Railroad Company, and that company had a vested right to them.

Second. That by the terms of the act of June 28, 1870, lands granted, reserved, claimed or disposed of prior to definite location and also lands on the general line of the Atlantic and Pacific road were excluded from the operations of the grant, and these lands were then identified and reserved from the filing of the map of definite location of the Atlantic and Pacific Railroad; the filing and approval of which operated in law to reserve the lands within the indemnity, as well as within the primary limits of the grant.

Third. That when the Southern Pacific Company filed its map of definite location from Mojave to the Colorado river at Needles, all of these lands were set apart and reserved by executive orders of the United States.

Fourth. That it was not the *intention* of Congress to grant any of these lands to the Southern Pacific Company, and there is no difficulty in giving effect to such intention because the lands have been identified by the maps of definite location, as well as by the maps of definite *withdrawal* for the Atlantic and Pacific Company, and this act of the Executive Department gave identity and precision to the grant.

Upon principle, as well as upon authority, this branch of the case cannot be distinguished from

United States vs. Southern Pacific Railroad, 146 U. S., 570.

United States vs. Southern Pacific Railroad, 146 U. S., 619.

Southern Pacific Railroad vs. United States, 69 F. (C. C. A.) 47; and 168 U. S., 1, 66.

United States vs. Northern Pacific Railroad, 152 U. S., 284.

Lake Superior Railroad vs. Cunningham, 155 U. S., 354.

St. Paul Railroad vs. Northern Pacific Railroad, 139 U. S., 1.

Bardon vs. Northern Pacific Railroad, 145 U. S., 535.

Whitney vs. Taylor, 158 U. S., 85.

Northern Pacific Company vs. Musser-Company, 168 U. S., 604, 610, 611.

Third Point.

SOUTHERN PACIFIC "BRANCH LINE" GRANT DID NOT OPERATE ON ATLANTIC AND PACIFC GRANT, PRIMARY OR INDEMNITY LIMITS.

Under the act of March 3, 1871, the Southern Pacific Company filed its map of general route on April 3, 1871, and its map of definite location in five sections during the years from 1874 to 1878, and the Atlantic and Pacific Company, under its grant of July 27, 1866, filed its map of definite location in 1872. at which time all the lands within the thirty-mile limits were withdrawn and reserved. None of these lands could pass to the Southern Pacific Company under its grant of 1871.

First. The lands within the forfeited Atlantic and Pacific grant, claimed by the Southern Pacific Company under its branch line grant were therefore granted to the Atlantic and Pacific Company long before any grant was made to the Southern Pacific Company.

Second. Long before the Southern Pacific Company filed its map of definite location these lands had been withdrawn and reserved by operation of law upon the filing and approval of the Atlantic and Pacific map of definite location, which had the effect of reserving the lands within the granted, as well as indemnity, limits.

Third. When the Southern Pacific Company filed

its map of definite location these lands had long before been set apart and reserved by *executive orders* of the Government.

Fourth. That it was not the *intention* of Congress to grant these lands to the Southern Pacific Company.

Upon the authorities last above cited, it is submitted that none of these lands can pass under the act of March 3, 1871, to the Southern Pacific Company.

Fourth Point.

WHEN THE SOUTHERN PACIFIC FILED ITS MAP OF DEFINITE LOCATION ON THE MAIN LINE BETWEEN MOJAVE AND NEEDLES IN 1885, AND UPON THE BRANCH LINE BETWEEN MOJAVE AND YUMA BETWEEN 1874 AND 1878, THESE LANDS WERE RESERVED.

(1) As shown to the court in the statement of the case, and as also shown in the table of dates in appendix (3), the maps of definite location of the Atlantic and Pacific Company were approved in 1872, and by executive orders all of the land falling within the thirty-mile limit was withdrawn and reserved before the Southern Pacific Railroad Company had filed any section of its map of definite location upon either its main or branch line covering the lands within the Atlantic and Pacific grant.

It is true the Southern Pacific filed its map of general route on the main line in 1867, and on the branch in 1871, but did not file any section of its map of defi-

nite location until 1885 on the main line east of Mojave, nor until 1874 on the branch. The general route location gave no right to any tract of land, and the right of disposal remained with the Government.

Kansas Railroad vs. Dunmeyer, 113 U. S., 629.

U. S. vs. Southern Pacific Railroad, 146, U. S., 570, 599.

Southern Pacific vs. United States, 168 U.S., 1, 41, 42.

New Orleans Railroad vs. Parker, 143 U. S., 42, 57.

United States vs. Oregon Railroad, 176 U. S., 28.

Southern Pacific vs. Sanders, 166 U. S., 620, 636.

Independent of the effect of the prior adjudications against the Southern Pacific Company and its privies, and independent of any filing of any map of definite location by the Atlantic and Pacific Company, taking effect by relation, as of the date of the grant, the *executive withdrawal* of these lands before the Southern Pacific grants attached operated to except them and exclude them from either of the grants of the Southern Pacific Railroad Company.

Lands so reserved by executive orders, when the map of definite location is filed, *cannot be operated upon* by the grant subsequently made.

Wilcox vs. Jackson, 14 Pet., 498.

Musser-Sauntry Co., 168 U. S., 604, 610, 611, and cases there cited.

Wolcott vs. Des Moines Co., 5 Wall, 681.

Wolsey vs. Chapman, 101 U. S., 756.

United States vs. Missouri Railroad, 141 U.S., 374.

Hamblin vs. Western Land Co., 147 U. S., 358, 531.

Wisconsin Railroad vs. Forsythe, 159 U. S., 46, 54.

(2) By the terms of section 3 of the act of July 27, 1866, there is excluded from the operation of the grant of the Southern Pacific Railroad Compauy all lands covered by "*other claims*" at the time of the definite location.

The language of this section of the Atlantic and Pacific and Southern Pacific act is identical with that contained in the Congressional grant of July 2, 1864, to the Northern Pacific Railroad

In Northern Pacific Railroad Company vs. Sanders, 166 U. S., 620, 634, 636, it was held that lands *claimed* at or prior to the time of the definite location of the Northern Pacific grant were excepted from the operations of the act, and that a mineral location, whether valid or otherwise, constituted such a claim.

In Monetti vs. Dillon, 167 U. S., 703, it was held that a "lawful claim" to lands within the limits of the Central Pacific grant which existed at or before the time of definite location, operated to except such land from the railroad grant, and that the withdrawal on the map of general route of the Central Pacific Company did not prevent such claim from attaching prior to definite location.

The fact that the Atlantic and Pacific Company *claimed* these lands as a part of its grant by virtue of what it claimed were maps of definite location, which claim was made effective from the year 1872, when the maps were filed, down to the forfeiture of the grant in 1886, would in itself operate to exclude these lands from the grants.

The rulings in Northern Pacific vs. Sanders, supra and Monetti vs. Dillion, supra, clearly support this view.

Fifth Point.

LANDS WITHIN GRANTED AND INDEMNITY LIMITS OF ATLANTIC AND PACIFIC GRANT NOT SUBJECT TO SELECTION AS INDEMNITY BY SOUTHERN PACIFIC UNDER ITS GRANTS.

(1) It is now claimed by the Southern Pacific Company that if it is not entitled to take, under its grants, lands within the limits of the Atlantic and Pacific grant as *granted* lands, yet that it may take them as *indemnity* for losses in its place limits.

In the former decisions in 146 U. S., 570, 619, and 168 U. S., 1, 66, it was adjudged that by the act of forfeiture of July 6, 1886, the Atlantic and Pacific grant was forfeited to the United States, and by that act became the "*property of the United States*" (168 U. S., 62), and such forfeiture by the United States was "for *its own benefit* and *not that of the Southern Pacific Company*." (146 U. S., 607.)

The conclusive effect of the former adjudications against the Southern Pacific Company in the present case has been presented in the first point of this brief.

If the lands appertaining to the Atlantic and Pacific grant in California were restored to the public domain "*as the property of the United States*" and "*for the benefit of the United States and not for the benefit of the Southern Pacific Company*," it cannot be that the South-

ern Pacific can take any of these lands as *indemnity* under a pre-existing right conferred by the act of 1866, joint resolution of 1870, or act of 1871.

(2) Aside from the effect of the prior adjudications as *res adjudicata*, the claim of the Southern Pacific that it can select these lands since the forfeiture by the act of 1886 as indemnity has been adjudged against the company as a matter of law.

In Southern Pacific vs. United States (168 U. S., 1) the lands, the subject-matter of that suit, were within both the granted and indemnity limits of the Southern Pacific Railroad Company, and were also within the granted and indemnity limits of the Atlantic and Pacific grant.

In that case the court said (pp. 46, 47):

"It may be said that the lands here in dispute belong to one or the other of the following classes * * * *lands within the Southern Pacific indemnity limits and the Atlantic and Pacific granted limits, lands within the common indemnity limits of both grants*," * * * "but all the lands now in dispute are within the limits of the grant to the Atlantic and Pacific Company if the maps filed by that company in 1872, and which were approved by the Land Department, are to be regarded as maps of definite location."

In that case the decree of the Circuit Court established the title of those lands in the United States and *enjoined* the Southern Pacific Railroad Company *from claiming any interest in them.* That decree was affirmed as to the Southern Pacific Railroad Company *in all respects.* (see 168 U. S., 66.)

The question as to the right of the Southern Pacific to select the Atlantic and Pacific lands as indemnity,

was discussed and argued industriously by counsel, and as ably as the nature of the topic would permit, but the contention was as clearly denied by the court.

Counsel for the Southern Pacific thought the court had "inadvertantly" and "erroneously" affirmed the decree of the courts below affecting the right of the Southern Pacific Railroad Company *subsequently to the passage of the Atlantic and Pacific forfeiture act of July 6, 1886, to select those lands as indemnity* for losses within the place limits, and thereupon presented to the court a petition for re-hearing, in which that question was again argued at great length, but the petition for re-hearing was denied.

The petition for re-hearing of counsel for the Southern Pacific, presenting the question of the right of the Southern Pacific to select the Atlantic and Pacific land as indemnity since the forfeiture of 1886, and presenting other questions argued in this court and disposed of, and which are now again presented to your Honors, is printed in appendix (1) to this brief for the inspection of the court.

It therefore appears that this question is not open for discussion.

Aside, however, from these direct decisions, other considerations of the question are equally against the contention of the Southern Pacific.

Lands Set Apart and Reserved for Atlantic and Pacific Not Operated Upon by Southern Pacific Grants.

(3) It is a well settled principle in the construction

of Congressional grants that lands set apart and reserved by Congress or by other competent authority cannot be taken or *operated upon* by any subsequent grant.

In Wilcox vs. Jackson (13 Pet., 513) the court laid down the rule as follows:

"But we go further and say that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands and that no subsequent law, or proclamation, or sale would be construed to embrace it or to operate upon it, although no reservation were made of it."

In United States vs. Missouri Railway (141 U. S., 374), in considering the right of a railroad to select as indemnity, lands within the limits of another railroad grant, reserved but not including lands granted to the other railroad, the court said:

"In neither case, however, could lands be selected that had been previously withdrawn by a competent authority from location, sale, or entry, or had been appropriated or sold by the United States, or to which pre-emption or homestead rights had attached."

And the court further said, at page 368:

"The first proviso to the same section reserved and excepted *from the operation of the act* all lands reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever. Of course, lands so reserved and exempted *from the operation of the act* could not be selected as indemnity lands for the road in aid of the construction of which the grant of 1866 was made."

The court further said at page 371:

"They could not be selected as indemnity lands under

the act of 1863, because the lands to be selected under that act were restricted to *odd numbered sections*, nor under the act of 1866, because *at the date of its passage they were reserved for the special purposes indicated in the second section of the act of 1863.*"

The principle is illustrated in United States vs. Southern Pacific Railroad (*supra*), where it was held that lands within the *indemnity* limits of the Atlantic and Pacific grant could not be taken as granted lands by the Southern Pacific Company *without regard to the time when the Southern Pacific Company filed its map of definite location*, for the reason that these lands had been reserved by Congressional authority.

In Bardon vs. Northern Pacific Railroad (154 U. S., 288), the mineral lands were not identified in any way at the time the company filed its map of definite location. Yet it was held that when they were identified thereafter they could not be operated upon by the railroad grant because they were reserved to the United States by another act of Congress.

This contention of counsel for appellants is at war with this settled rule that lands set apart by Congress or by other competent authority cannot be *operated upon* by any subsequent law or proclamation, unless specifically declared to cover the premises.

The law set apart and identified these lands when the Atlantic and Pacific map of definite location was filed, as declared by this court again and again. (Buttz vs. Northern Pacific Railroad, 119 U. S., 55; St. Paul Railroad vs. Northern Railroad, 139 U. S., 1.)

The Secretary of the Interior also set apart, reserved,

and withdrew these lands as shown by maps of definite withdrawal, which it was his duty to do whether the act expressly directed it or not. (Hamblin vs. Western Land Company, 147 U. S., 531; United States vs. Des Moines Company, 142 U. S., 510.) The lands within the 30-mile limits were reserved by executive orders for that company years before the Southern Pacific filed its maps of definite location under its junior grants.

This court has often said that it is a duty of the Secretary of the Interior to set apart and reserve sufficient land where a grant is made by Congress so that the grant may be satisfied. Spencer vs. McDougal, 159 U. S., 62.

The principle that lands set apart for a public purpose at the date of a railroad land grant cannot be taken for another purpose, declared in so many cases, has been emphasized in the recent decision in Sioux City Railroad vs. United States (159 U. S., 349), and in Chicago R. R. vs. United States (159 U. S., 372, at p. 375), in holding that the moity of lands in an overlap granted to the Sioux City Railroad could not be used as a base by the Chicago Railroad upon which *indemnity* selections could be made, and that the grant to one road could not operate at all upon any of the lands appurtenant to the grant to the other, for the reason that those lands had been set apart by Congress for another railroad, and thus neither company *could obtain any benefits from the forfeited grant of the other.*

In the Northern Pacific vs. Musser-Sauntry Co., 168 U. S., 604, at p. 611, the court said:

"When a withdrawal of lands within indemnity limits is made in aid of an *earlier* land grant, and made prior to the filing of the map of definite location by the company having the later grant, the latter having such words of exception and limitation as are found in the grant to the plaintiff, *it operates to except the withdrawn lands from the scope of such later grant.*"

It is therefore submitted that the contention that these lands can be selected as indemnity by the Southern Pacific Company is not supported by principle or by authority.

Southern Pacific Grant Forbade the Selection of These Lands as Indemnity.

(4) Aside from the question of intention and the principle of reservation, it is expressly provided by the Southern Pacific grant that these lands cannot be taken as indemnity.

The provision in section 3 of the act of July 27, 1866, referred to in the act of 1871, and joint resolution of 1870 governing indemnity selections, provides as follows:

"and whenever prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted, or otherwise disposed of, *other lands* shall be selected by said company in lieu thereof, under the direction of the Secretary of the interior, *in alternate sections* and designated by *odd numbers*, not more than 10 miles beyonds the limits of said alternate sections and not including the *reserved numbers.*"

It will be observed that the selections are to be made from "*odd numbers*" and from lands which do not include the "*reserved numbers.*"

If the selections could be made from the alternate *even sections* the act would not have required that they should be made only from the *odd numbers*. It is therefore evident that the "*reserved numbers*" referred to are those which have been previously granted, sold, reserved, or otherwise disposed of by the United States, and in that case lands granted to or reserved for the Atlantic and Pacific Railroad could not be selected as indemnity.

We are not lacking authority upon this particular question. In United States vs. Missouri Railroad (141 U. S., 374) it was expressly held that the provisions of that act, excluding from the operations of the grant lands reserved by Congress in any manner, by any competent authority, could under no circumstances be selected as indemnity by another railroad, although the United States held full title to such lands at all the times referred to in that case.

In adjudged cases in the Interior Department it has been held that lands within the forfeited Atlantic and Pacific grant cannot be selected as indemnity by the Southern Pacific Company. (Southern Pacific Railroad Co., 6 Land Decisions, 816; Moore vs. Kellogg, 17 id., 391–392; Southern Pacific Railroad Company vs. Moore, 11 id., 534; Southern Pacific Railroad Company, 15 id., 460.)

In Southern Pacific vs. United States, 168 U. S., 1, a part of the lands being within the *indemnity limits* of the Southern Pacific, and in Atlantic and Pacific primary and indemnity limits, and it being contended by

the Southern Pacific that subsequent to the forfeiture of 1886 it had a right to select those lands as indemnity, the court said (page 62):

"as all the lands here in controversy are embraced by the maps of 1872 (Atlantic and Pacific maps), and therefore appertain to the line located by such maps, it must be for the reason stated in the former decision (146 U. S., 570), that the United States is entitled, as between it and the Southern Pacific Railroad, to the relief given by the decree below."

The relief given by the decree below was to perpetually enjoin the Southern Pacific from claiming any of those lands.

(5) There would be nothing gained in the prosecution of this suit by the Government, or of any other suit of a similar character, if the contention of the Southern Pacific is sound, viz., that if it cannot take these Atlantic & Pacific lands as a part of its primary grant, it may select them as indemnity. For what would be the object in recovering from the Southern Pacific these lands, only to lay the foundation for the Southern Pacific to take an equal quantity of other lands in lieu of them, or to allow them to be taken under indemnity selections. The effect of such an operation would be that whenever the Government had recovered a section of land it would thereby assure to the Southern Pacific the right to take an equal quantity of as good or better land from other parts of the public domain, or take the same land as a lieu selection. Such an absurd result could not have been within the contemplation of Congress.

Sixth Point.

MILLS AND KING, TRUSTEES IN THE MORTGAGE EXECUTED BY THE SOUTHERN PACIFIC IN 1875, AND THE CENTRAL TRUST COMPANY, TRUSTEE IN THE MORTGAGE MADE BY THAT COMPANY IN 1888, ARE NOT BONA FIDE PURCHASERS OF THESE LANDS AND HAVE NO LEGAL OR EQUITABLE TITLE TO THEM.

(1) In the first point of this brief it was shown that both of these mortgages contained provisions assented to by the trustees and the bondholders, to the effect that the Southern Pacific Railroad Company should have the *sole and exclusive management and control of these lands, and should be empowered to sell them*, and it was shown we think that the prior adjudications against the Southern Pacific, operated against the trustees for the bondholders who were represented in those cases and who were in privity with the Southern Pacific Company.

(2) The trustees in the mortgage executed by the Southern Pacific in 1875, then Mills and Lansing, now Mills and King, were parties to the suits decided in 146 U. S., 615, 619 [rec. 778], and being *parties* that is not only a conclusive adjudication against them that they acquired no interest in these lands by virtue of the mortgage of 1875, but we find there a decision which establishes *as matter of law* that such a mortgage as that executed in 1875 cannot convey any interest to trustees or bondholders which could avail them

in the former suit or which can avail them in this suit.

The mortgages of 1875 and 1888 are essentially identical in terms.

When the former cases were decided, the act of March 3, 1887, protecting the rights of bona fide purchasers of patented lands was in full force and operation, as it was also in operation when the cases were commenced; and the answer in the former cases distinctly put in issue the rights of the trustees and bondholders under that mortgage.

The court having entered a decree against the Southern Pacific Railroad Company, and against Mills and Lansing, trustees (146 U. S., 570, 614), and having adjudged that the mortgage of 1875 was inoperative to prevent the government from taking a decree, it follows, as a matter of law, aside from the effect of *res adjudicata* that the mortgage was wholly inoperative as to these lands.

That the act of Congress of March 2, 1896, gave no right to the trustees was determined in the case in 168 U. S., 1–66, when the judgment against the trustees was affirmed.

(3) The contention of counsel for defendants that the mortgages of 1875 and 1888 are deeds and not mortgages does not find any support, as appears from an inspection of the instruments themselves.

If the legal title was conveyed by the instrument of 1875 to Mills and Lansing, of course the legal title could not have been conveyed to the Central Trust Company by the instrument of 1888.

That these instruments are both mortgages clearly appears from an inspection of them.

The mortgage of April 1, 1875, between the Southern Pacific Railroad Company, party of the first part, and Mills and Tevis (King now substituted for Tevis), parties of the second part, first recites the acts of Congress, approved July 27, 1866, and March 3, 1871, and then recites that certain bonds have been authorized to be issued, and then provides as follows:

"Whereas, the said Board of Directors at the meeting aforesaid and in the manner and form and by the vote aforesaid, did further direct that to secure the payment of said bonds a *first mortgage* upon said road and its rolling stock, stations, fixtures, right of way and franchises, *and the lands aforesaid, granted by said acts of Congress* (July 27, 1866, and March 3, 1871) * * should be executed under the corporate seal of said company * * *." [record 1096.]

"Now, therefore, this indenture witnesseth: That the said Southern Pacific Railroad Company, for the better securing of the payment of the principal and interest *of the said first mortgage bonds*, * * * by these presents doth grant, bargain, sell, alien, convey and confirm unto the said parties of the second part and to their successors, duly appointed, for the execution of the trusts herein set forth, the following property * * * [rec. 1697], *all and singular the said several sections of land so as aforesaid granted by said acts of Congress* * * *." [rec 1704, 1705]

The instrument then provides as follows:

"That all the lands hereinabove conveyed and mortgaged shall be under the sole and exclusive management and control *of the said party of the first part*, who shall have full power and authority to make contracts for the sale of the same, at such price, on such credit or terms of payment, and such other conditions as shall be agreed on by the said parties of the first and second

parts, and as shall seem to them best calculated to secure the payment in full of all the bonds issued as hereinbefore provided, until entry or foreclosure by the trustees * * * ." [rec. 1706.]

The instrument of August 25, 1888, to the Central Trust Company [rec. 1745], is similar in its terms to the instrument of 1875, but provides as follows: [rec. 1751.]

"All lands granted or conveyed under the acts of Congress hereinbefore referred to and in anywise affected by the provisions hereof, shall be subject to the express provision that if and so long as the bonds issued under and secured by the said indenture of mortgage to D. O. Mills and Lloyd Tevis, dated April 1, 1875, or any thereof shall remain outstanding, any and all sales made in the manner in said last-mentioned indenture of mortgage prescribed, shall absolutely and forever release the said lands from any and all lien or encumbrance of under or in respect of this mortgage or the bonds issued thereunder; and if and when all the bonds issued under said indenture of mortgage of April 1, 1875, shall have been fully satisfied and discharged, and the lien of such last-mentioned indenture of mortgage upon such lands fully released, then the said lands, so far as they remain unsold at that time, shall be subject to the like provisions in respect to sale, and conveyance and release from the lien of this mortgage as are in said mortgage of April 1, 1875, prescribed in respect to sale and conveyance and release from the lien thereof."

Each of these mortgages was given *to secure a debt.*

It will be observed that the parties, themselves, to both of these instruments declare their intention as to what the instruments are by referring to them both as "mortgages"; and it will be observed that it is declared in both instruments that the bonds constitute a *lien* upon the lands; and it will be observed further that in

both instruments the full and absolute control and disposition of the lands remains in the Southern Pacific Railroad Company until a suit for foreclosure shall have been commenced.

It will be further observed that the lien of the bonds is to be satisfied by a foreclosure.

In Jones on Mortgages (4th ed.), section 62, it is said:

"A deed of trust to secure a debt is in legal effect a mortgage. It is a conveyance made to a person other than the creditor, conditioned to be void if the debt be paid at a certain time, but if not paid that the grantee may sell the land and apply the proceeds to the extinguishment of the debt, paying over the surplus to the grantor. The addition of the power of sale does not change the character of the instrument any more than it does when contained in a mortgage. Such a deed has all the essential elements of a mortgage; it is a conveyance of land as security for a debt."

In Perry on Trusts, Vol. 2, sec. 602, *d* it is said:

"Mortgages containing powers of sale and deeds of trust to secure a debt due to a creditor, are substantially the same thing in law and equity. At law, both kinds of deeds purport to convey the legal title to the grantee or creditor, or trustee; but in equity the land, the title and the deeds stand for security of the debt. The debt is the principal thing, and the conveyance of the land is collateral to the debt. The mortgagor in both cases has an estate in the land called an equity of redemption; if he fails to pay the debt, his equity of redemption is barred upon due proceedings had; but if the debt is paid at any time before his equity is defeated by the steps appointed to be taken, it becomes absolute, and he is entitled to a re-conveyance or a discharge of the mortgage, as the case may be. In some circumstances a discharge of the mortgage upon payment or a re-conveyance is not material, as by the

terms of the mortgage and by the law it becomes null and void. A mortgage is a pledge or security for a debt, whatever may the form which the transaction takes, whether a simple mortgage deed in form, or a mortgage with a power of sale, or a deed in trust, or a deed absolute on its face, accompanied by an agreement in writing to re convey, or to sell, or to do any other thing upon the payment of a certain sum of money; courts of equity look upon it as a mortgage, and deal with it as such. The test in all these forms is this: Does the transaction resolve itself into a security for the payment of a sum of money or a debt, and until a default in the payment of a sum of money or a debt, has the grantor any right to pay the money and keep or receive back the title to his property? And it is immaterial that the conveyance is made to a third person, and not to the creditor himself."

The contention of counsel for the Southern Pacific is that the trustees in the mortgages of 1875 and 1888 are bona fide purchasers of these lands and protected in their rights by the provisions of the acts of Congress of March 3, 1887, and March 2, 1896, relating to the adjustment of railroad grants.

These acts are printed in the appendix and are greatly relied upon by counsel for the Southern Pacific.

It is provided in the act of March 3, 1887, as follows:

"*That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act.* * * * * * *."

These acts are in *pari materia* and should be construed together. They both relate to the adjustment of railroad grants, they both make provisiou for the protection of bona fide purchasers from the railroad of lands erroneously patented or certified, and they both define the rights of such purchasers.

The principle is well settled that statutes in *pari materia* are to be construed together, and effect must be given to all the parts.

United States vs. Tynen, 11 Wall., 88, 92.

Chicago Railroad vs. United States, 127 U. S., 406.

Chew Heong vs. United States, 112 U. S., 536.

District of Columbia vs. Hutton, 143 U. S., 18.

Frost vs. Wenie, 157 U. S., 461, 58.

United States vs. Healey, 160 U. S., 136, 146.

That Congress intended these acts to be construed together, and that the act of March 2, 1896, was an amendment of the act of 1887, appears from the last clause of section 2 of the act, which provides in effect that a bona fide purchaser of lands may establish his claim in the United States courts "or at his option as prescribed in sections 3 and 4 of chapter 376 of the acts of the Second Session of the 49th Congress," which chapter there designated is the act of March 3, 1887. Thus, in the act of March 2, 1896, Congress not only refers to the provisions of sections 3 and 4 of the act of March 3, 1887, but gives the provisions of those sections new life and vitality by continuing their operation; and one of the provisions of section 4 is that a mortgage or pledge shall not be deemed to be a sale.

This provision, therefore, has not been repealed and remains in full force, and as the instruments of 1875 and 1888 to the trustees to secure bonds were each in the nature of a mortgage or pledge of the lands, they cannot be construed as a sale or conveyance within the meaning of the acts of Congress referred to.

Congress was dealing with mortgages or trust deeds made by railroads to secure bonds. It had been the universal custom of railroads to issue bonds secured by mortgages or deeds of trust and covering the land grants, and Congress, knowing this, provided that nothing in the nature of a pledge or mortgage should be considered a sale.

As the instruments in question here were executed for the sole purpose of *securing a debt*, they must, under the authorities above cited, and in view of the intention of Congress, be considered as a pledge or mortgage of the lands.

All of the patents issued to the Southern Pacific were void absolutely for want of power and authority to execute them. They could be attacked in suits at law or in equity directly or indirectly, and third parties were fully chargeable with notice from the public laws and records, that the lands were reserved, and that the patents were void.

Doolan vs. Carr, 125 U. S., 618.
Newhall vs. Sanger, 92 U. S., 761.
Morton vs. Nebraska, 21 Wall., 660.

And the mortgagees or purchasers were bound to take notice of the *power* of the officials of the Land Department to issue these patents.

Sioux City Railroad vs. United States, 159 U. S., 349, at p. 371.

Neither mortgagees nor purchasers, therefore, could ever have been considered bona fide purchasers, without notice, in the absence of the legislation of March

3, 1887, and March 2, 1896; and that legislation expressly provided that mortgages and pledges shall not be construed to be sales.

(4) The deeds of trust to the Central Trust Company and to Mills and Lansing (now King) *do not cover the lands granted to or reserved for the Atlantic & Pacific Railroad Company*, being lands in suit herein.

Those instruments do not describe any particular tracts of land, as has been shown by the quotations of parts of those instruments, but in general terms purport to cover "the lands granted to said railroad company by the acts of Congress of March 3, 1871, and July 27, 1866."

Turning now to Section 3 of the act of Congress of July 27, 1866, *which describes the lands covered by that grant and by the grant of 1871*, we find that the following is the description:

"That there be and hereby is granted * * * * * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States; and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, *and whenever on the line thereof the United States have full title, not reserved, sold, granted or otherwise appropriated*, and free from pre-emption or other claims or rights *at the time the line of said route is designated* by a plat thereof, filed in the office of the Commissioner of the General Land Office." * * * * *

The lands in suit having been granted to and reserved for the Atlantic and Pacific Railroad Company, were not and could not have been included in the grant

to the Southern Pacific Railroad Company, and they were not and could not have been covered by the mortgages in question, as those mortgages were expressly limited to lands *granted* to the Southern Pacific.

These lands which were reserved or otherwise disposed of prior to the Southern Pacific filing its map, were not included *in the description of the land conveyed.*

United States vs. Southern Pacific, 146 U. S., 570, 619.

Southern Pacific vs. United States, 168 U. S., 1.

This proposition seems so plain that further argument is deemed unnecessary.

Seventh Point.

THE GOVERNMENT IS ENTITLED TO A DECREE AGAINST THE PRESENT DEFENDANTS FOR THE THIRTY THOUSAND ACRES OF LANDS AS TO WHICH THE BILL WAS DISMISSED BY THE CIRCUIT COURT, WHICH LANDS WERE CONTRACTED TO BE SOLD BY THE RAILROAD AND UPON WHICH PARTIAL PAYMENT ONLY HAS BEEN MADE.

(1) In subdivisions four and five of the first point of this brief, it was shown to the court that *subsequent* to the commencement of the suit against the Southern Pacific Railroad Company, decided in 146 U. S., 615, 619, that company had contracted to sell a large quantity of land, sued for in the present case, to divers persons, and prior to the commencement of the *present*

suit, the railroad had received only a partial payment upon their purchase price.

And that as to all the 30,000 acres to which the court below determined the title against the Government, only a part and a small part of the purchase price had been paid at either the date of commencement of this case or the former case. (See appendix.)

It was contended by the Government that by reason of the former adjudications the Southern Pacific Company, and those in privity with it, were estopped in the present case from claiming that any right or title to these lands had been acquired, inasmuch as the estoppel operates as fully against privies as against parties, and the purchasers were undoubtedly in privity with the Southern Pacific Railroad Company, except as to payments made prior to the commencement of the former suit.

(2) It was also shown we think in the former part of the brief, that inasmuch as the land had been contracted to be sold by *executory contracts*, and that a partial payment only had been made, that the Southern Pacific Railroad Company had, at the time of the commencement of this suit, an interest in those lands, and that by reason of the prior adjudications the Government is now entitled to have its title quieted to them.

(3) The United States has taken a cross-appeal from that part of the decree dismissing the bill as to these lands, and now, upon the merits of the case, in addition to the effect of the prior adjudications, it is insisted that the Government is entitled to a decree against the present defendants for these lands.

That the railroad company has parted with some equitable title or right to these lands cannot deprive the Government of the right to a decree for the *remaining title and interest* held by the railroad company.

In Lytle vs. Lansing, 147 U. S., 59, at page 70, the court said that it was "*a settled rule in equity that a purchaser without notice to be entitled to protection must not only be so at the time of the contract or conveyance, but at the time of payment of the purchase price*," and cited numerous authorities in support of that settled principle.

At the time these contracts of purchase were made, the lands had not been patented, nor where they patented when this suit was commenced (see appendix); the legal title to these lands was in the United States. The most favorable aspect of the case for the railroad company is that by making these executory contracts and receiving a payment upon the purchase price, the purchaser, by reason of the adjustment act of 1887, became possessed of an *equitable interest* to the extent of the payment made, and that the legal title remained in the Government, to be held subject to the payment of the balance of the purchase price.

The principle is well settled that where property is sold by executory contract upon partial payment, the legal title remains in the vendor, to be held until the balance of the purchase price is paid, and that the purchaser has an equitable title only to the extent of the payment made.

Williams vs. United States, 138 U. S , 514, 516.

Jennisons vs. Leonard, 21 Wall., 302, 309.

1 Story's Eq. Jur., 396.

It is not perceived why the Circuit Court refused to subrogate the Government to the interest in these lands claimed by the Southern Pacific Company.

The effect of the decree below is to give all these lands to the Railroad Company.

Granting to the purchasers all the rights and inests claimed on their behalf by counsel by virtue of the adjustment acts of March 3, 1887, of February 12, 1896, and March 2, 1895 (see appendix), and it is not perceived why the Government is not entitled to a decree for the interest claimed by the company. The act of Congress of Feb. 12, 1896, expressly provides that in cases where sales have been made by the company of patented lands (excepted from the grant) upon partial payment, and where less has been paid than the Government price, that the purchaser can secure a patent from the United States only *by paying to the United States* the difference between what he paid the company and the Government price. This act of March 12, 1896, amending the act of March 3, 1887, clearly shows the intention of Congress.

Congress did not intend to give these lands to the purchaser without their being paid for, and did not intend to give them to the company unless there had been a completed sale, and even in that case required the company to pay over to the Government the Government price for the lands.

The Circuit Court has not given the land to either

the purchaser or to the Government, but in effect to the railroad.

Undoubtedly the act of Congress of March 2, 1896, was in the nature of a *new grant* to the purchaser upon the theory that his interests had been prejudiced by the erroneous rulings of the officers of the Interior Department. (Winona cases, 165 U. S., 463, 483.)

That act did not confirm the title of the railroad company nor did it enlarge or affect the title of the company in any respect, and it was for the *benefit of the purchaser* that the act was passed.

In Litchfield vs. Webster County, 101 U. S., 773, 775, the court construed the joint resolution of Congress of March 2, 1861, which is almost identical with the act of March 2, 1896, and originated under similar circumstances.

It had been adjudged by the court in Wolcott vs. Des Moines Co., 5 Wall., 681, and other cases, that the lands between the Racoon Fork of the Des Moines river and the north boundary of the State of Iowa, were not embraced in the grant made by Congress for the improvement of the Des Moines river, although they had been reserved by executive orders for that purpose and patents had been erroneously issued to the State and the lands had been sold to bona fide purchasers, and the court held that the joint resolution of March 2, 1861, which confirmed the title of bona fide purchasers, was *a new grant to the purchaser*, and the court said (101 U. S., 774, 775):

"The grant made by that resolution was just as much

an original grant as if the act of 1846 (for the Des Moines improvement) had never been passed. The order of the executive department reserving them from sale neither transferred any title to nor created any interest in the State. It simply retained the ownership in the United States. While the subsequent gift was undoubtedly induced by what had happened before, the United States, until it was made, continued to be the proprietor of the lands, both in law and in equity. Such being the case they were not taxable before March 2, 1861. They, down to that time, actually belonged to the United States, and no one else had any interest whatever in them. * * * *The title thus relinquished enured at once to the benefit of the purchasers, for whose use the relinquishment was made.*"

It will hardly be contended here that the act of 1887, or either of the acts of 1896, were intended to or did operate to confirm any title to the *railroad* or enlarge the interest of that company in any way in them. The acts were passed for the benefit only of the bona fide purchasers, and that being so how could it be, that either of those acts could pass to or confirm in such purchasers any *greater interest* than they had acquired under their executory contracts? It is submitted that the decree of the Circuit Court dismissing the bill as to these lands is erroneous.

THE WRONGFUL PROCUREMENT OF PATENTS THROUGH THE INTERIOR DEPARTMENT BY THE SOUTHERN PACIFIC, *PENDENTE LITE*, CANNOT AID THE DEFENDANTS IN THIS SUIT, AS THE CIRCUIT COURT THEN HAD JURISDICTION OF THE PARTIES AND OF THE SUBJECT-MATTER.

As before shown, the 30,000 acres as to which the court

dismissed the bill, and being the same lands above mentioned, were patented *pendente lite.*

The present bill was filed May 14, 1894 (record 330). On July 23, 1894, defendants were served with subpœna (record 41).

The defendants appeared and filed pleas in abatement on September 1, 1894 (record 42, 45, 48), which pleas were overruled.

In some unexplained manner, and while this cause was pending for trial, and when the Circuit Court had complete jurisdiction of the parties and of the cause, the Southern Pacific Railroad Company, on November 28, 1894, December 22, 1894, and July 27, 1895, respectively, procured three patents from the Interior Department embracing thirty thousand acres of the identical land sued for by the present bill, and situated within the Atlantic and Pacific grant (record 2563, 2575, 2585).

Prior to the commencement of this suit, and while the land remained unpatented, the Southern Pacific had contracted to sell the most but not all of these thirty thousand acres to divers persons, upon which a part only of the agreed purchase price had been paid (see appendix hereto).

The Circuit Court, by its final decree, in effect dismissed the bill as to all of these thirty thousand acres, upon the ground that these persons holding under contracts were bona fide purchasers of the land, and that the title to this land had been confirmed by the provisions of the act of Congress of March 2, 1896 (record 353, 362).

The effect of this decree was to finally determine that the Southern Pacific Railroad Company was the owner, by absolute title in fee, of these lands, and that the United States had no title or estate, legal or equitable, in them.

The effect of the decree is to so establish the title in the Southern Pacific Company that it can maintain and enforce actions against the purchasers of these lands for the remainder of the purchase price, and deprives the Government of any interest in the land, notwithstanding that only a small part of the purchase price had been paid to the railroad company, which company held the legal title, and an equitable interest, in the property, subject to the payment of the balance of the purchase price.

For the purposes of argument and treating the land as patented land sold to bona fide purchasers, it is obvious that the effect of the decree is to nullify the provisions of the acts of Congress of March 3, 1887, and February 12, 1896, which explicitly require the bona fide purchaser *to pay to the United States* the difference between what has been paid and the ordinary Government price, before patent can be secured from the United States.

But none of the purchasers of these thirty thousand acres were bona fide purchasers or purchasers at all of any *patented lands*, because, as before stated, at the time contracts were made the lands were unpatented, and the act of Congress of March 2, 1896 (see appendix) only purported to confirm and protect the title of *patented lands* held by bona fide purchasers.

When those contracts were made the purchasers, of course, were fully informed, from the state of the records and from the contracts themselves, that the lands were unpatented, and the purchasers expressly agreed in those contracts (record 2052, 2551, 2552) that the Southern Pacific Railroad Company "will use ordinary diligence to procure titles for them"; and it is further provided (record 2553) "that the party of the second part (the purchaser) * * * will do no act to hinder, delay or impede the obtaining of patent for them by the party of the first part * * * ."

It is obviously contemplated by these contracts that in all matters and proceedings relating to the procurement of title to these lands by the railroad company that it should at all times fully represent and act for the purchasers, so that not only did the railroad company hold the legal title at the time the decree herein was entered, but it held an equitable interest in the lands to the extent of the unpaid purchase price upon its own account, and it acted for the purchasers in the procurement of patent.

It is, therefore, submitted, that upon well settled principles, the wrongful issuance of these patents to the Southern Pacific Company, pendente lite, should not aid the railroad company or the purchasers in holding this land as patented land sold to bona fide purchasers, as defined in the acts of 1887 and 1896.

There can be no doubt as to the jurisdiction of the Circuit Court over the parties and of the subject-matter, and it would seem that that court was empowered to go on and determine the respective rights of the United

States and of the defendants in these lands, without being obstructed or impeded by the acts of the Interior Department, although it may be a tribunal in some respects having a concurrent jurisdiction.

In Farmers Loan and Trust Company vs. Lake Street Railway, 177 U. S., 51, 61, the court said:

"The possession of the res vests the court, which has first acquired jurisdiction, with the power to hear and determine all controversies relating thereto, and, for the time being, disables other courts of co-ordinate jurisdiction from exercising a like power This rule is essential to the orderly administration of justice and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons."

See also

Moran vs. Sturges, 154 U. S., 256, 273, 275.

Harkrader vs. Wadley, 172 U. S., 148.

Central Bank vs. Stevens, 169 U. S., 432.

In Richmond Mining Company vs. Rose, 114 U. S., 576, 586, in an action brought under section 2325, Revised Statutes, to determine conflicting rights to a mining claim, and while the action was pending in the Circuit Court, one of the parties procured from the Inerior Department a patent to *another mining claim*, by virtue of which it was claimed the holder thereof was entitled to follow a vein upon its dip into the mining claims, the subject of suit, and the court said:

"the right to that part of this very vein being in contest between these parties in reference to the Uncle Sam and St. George claims, the decision of this controversy cannot be rendered nugatory by the introduction of a new claim by one of the parties, whose claim of right from the Government for this same loca-

tion is initiated while this litigation is going on. The parties were all in court. The subject-matter was before the court. The thing to be decided was the right of the conflicting claims to this lode. This was within the jurisdiction of the court, and any patent issued to one, or the other, or both these parties, under this proceeding for this property, must relate back to the date of their claims, and override the new patent. This result cannot be defeated by producing this new patent to destroy it. The claim was initiated by a party to this suit *pendente lite*, and must abide the result of the litigation in this case."

There has been no transaction as between the railroad company and these purchasers between the filing of this bill and the passage of the act of Congress of March 2, 1896, to be operated upon or affected by that act, and if these patents had not been procured pendente lite the Government would have been entitled to a decree establishing its title to these lands, subject only to the payment to the Government of the Government price of the lands, as provided in section 5 of the act of Congress of March 3, 1887 (see appendix).

It is submitted that the orderly administration of justice and the protection of litigating parties, as well as of the public, requires in this case the enforcement of the salutary rule above mentioned, that the rights of the parties to this suit must be determined without reference to the issuance of these patents pendente lite, and as if they had never been issued.

The enforcement of this rule will require a reversal of the decree of the Circuit Court upon the cross-appeal of the Government, and a decree in favor of the United States.

Eighth Point.

In the decree of the Circuit Court it was adjudged as follows:

"And it is further ordered, adjudged and decreed that this decree shall not affect any right which the United States may have to recover from the defendant Southern Pacific Railroad Company the proper Government price for any of the aforesaid lands sold by the said company to third persons, *nor shall it cancel or vacate any patent issued by the United States to the said Southern Pacific Railroad Company for lands sold by it to a bona fide purchaser.*" (rec. 362.)

The court erred in adjudging that the decree should not cancel or vacate any patent issued to the railroad company for lands sold to a bona fide purchaser.

The very purpose of this suit was to determine the rights of the United States to these lands as against the defendants before the court.

Even if any other person not a party defendant upon the record had or claimed to have any interest in these lands, that could not prevent the United States from obtaining a decree against the defendants here for their unfounded claims.

The option was with the United States to join or not to join persons having or claiming an interest in the lands.

Williams vs. United States, 138 U. S., 514, 516, 517.

But in the present case, it does not appear from the evidence that any of the lands have been patented to the railroad and sold to bona fide purchasers, other than the 30,000 acres sold by executory contracts upon par-

tial payments, and as to which the court, as the Government contends, erroneously dismissed the bill.

No other lands were patented to the company and sold to bona fide purchasers and the Government was entitled to a decree against the present defendants annulling all patents issued to the company and quieting its title as against the defendants.

In this case the court has fallen into the same error which was condemned in Southern Pacific Railroad vs. United States, 168 U. S, 1, 66.

In that case the court said at page 65:

"The decree which was passed declares that it is not to 'affect any right which the defendants, or any of them, other than the Southern Pacific Railroad Company, now have or may hereafter acquire in, to or respecting any of the lands hereinbefore described, in virtue of the act of Congress entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March 3, 1887.' *Instead of leaving undetermined the matters in dispute between the United States and the defendants other than the Southern Pacific Railroad Company, the Circuit Court should have determined, by its final decree, what rights those defendants have by virtue of the above act of March 3, 1887, 24 Stat., 556, c. 376, in the lands or any of them now in dispute and claimed by the United States. The effect of the decree is to leave undetermined the question whether the defendants who claim under the Southern Pacific Railroad Company are protected by that or any other act of Congress. The Government was entitled to a decree quieting its title to all the lands described in its pleadings except those, if any, that are protected, in the hands of claimants, by acts of Congress. United States vs. Winona & St. Peter Railroad, 165, U. S., 463; Winona & St. Peter Railroad vs. United States, 165, U. S.,*

483. But as the Government has not repealed, the decree cannot be reversed for the error of the Circuit Court in not finally disposing of the issues between the United States and the individual defendants who claim under the Southern Pacific Railroad."

The effect of the decree in the present case is to leave undetermined what rights the United States have to any of the lands for which the suit was brought, inasmuch as it cannot be ascertained from the decree what lands have been patented to the railroad nor what lands the railroad has sold to bona fide purchasers, and the title of the United States to all of the lands remains obscured and clouded by this provision.

In conclusion, it is submitted that the decree of the court below should be affirmed upon the appeal of the Southern Pacific Railroad Company and the trustees of the mortgage bonds, and should be reversed upon the appeal of the United States, with directions to enter a decree in favor of the Government for the relief sought.

JOSEPH H. CALL,
Special United States Attorney.

Appendix (1).

ACTS OF CONGRESS, AND LAWS OF CALIFORNIA.

ATLANTIC AND PACIFIC GRANT.

July 27, 1866 (14 Stat., 292).

AN ACT Granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast.

Section 1 incorporated the Atlantic and Pacific Railroad Company and provided for the construction and location of a line of railroad, as follows:

"Beginning at or near the town of Springfield, in the state of Missouri, thence to the western boundary line of said state, and thence by the most eligible railroad route, as shall be determined by said company, to a point on the Canadian river; thence to the town of Albuquerque, on the river Del Norte, and thence by way of Aqua Frio, or other suitable pass, to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as neear as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route to the Pacific."

Section 2 grants a right of way, etc.

"SEC. 3. *And be it further enacted*, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of said line of railway, and its branches, every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state;

and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preëmption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office, and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preëmpted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: *Provided*, That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said 'Atlantic and Pacific Railroad Company,' or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act: *Provided further*, That all mineral lands be, and the same are hereby excluded from the operations of this act; and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: *And provided further*, That the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: *And provided further*, That no money shall be drawn from the Treasury of the United States to aid in the construction of the said 'Atlantic and Pacific Railroad.'"

"SEC. 4. *And be it further enacted*, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said

railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

"SEC. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided in this act; but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled, 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, 1862, shall be, and the same are, hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company."

"SEC. 8. *And be it further enacted*, That each and every grant, right, and privilege herein are so made and given to and accepted by said Atlantic and Pacific Rail-

road Company upon and subject to the following conditions, namely: That the said company shall commence the work on said road within two years from the approval of this act by the President, and shall complete not less than fifty miles per year after the second year, and shall construct, equip, furnish, and complete the main line of the whole road by the fourth day of July, Anno Domini, eighteen hundred seventy-eight."

"SEC. 9. *And be it further enacted*, That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof, and allow the same to continue for upwards of one year, then, in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

"SEC. 11. *And be it further enacted*, That said Atlantic and Pacific Railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval and all other Government service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation."

"SEC. 12. *And be it further enacted*, That the acceptance of the terms, conditions, and impositions of this act by the said Atlantic and Pacific Railroad Company shall be signified in writing under the corporate seal of said company, duly executed, pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within two years after the passage of this act, and not afterwards, and shall be deposited in the office of the Secretary of the Interior."

"SEC. 18. *And be it further enacted*, That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point near the boundary line of the state of California, as they shall deem

most suitable for a railroad line to San Francisco; and shall have a uniform gauge and rate of freight or fare with said road, and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided; and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for.

"SEC. 20. *And be it further enacted*, That the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes Congress may, at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend, or repeal this act."

CALIFORNIA ACT OF APRIL 4, 1870, AUTHORIZING SOUTHERN PACIFIC COMPANY TO CHANGE LINE OF ROUTE AND TO ACCEPT CONGRESSIONAL GRANTS.

"Whereas, by the provisions of a certain act of Congress of the United States of America, entitled 'An act granting lands to aid in the construction of a railroad and telegraph line from San Francisco to the eastern line of the state of California,' approved July 27, 1866, certain grants were made to, and certain rights, privileges, powers and authority were vested in and conferred upon the Southern Pacific Railroad Company, a corporation duly organized and existing under the laws of the state of California, therefore, to enable the said company to more fully and completely comply with and perform the requirements, provisions and conditions of the said act of Congress, and all other acts of Congress now in force, or which may hereafter be enacted, the state of California hereby consents to said act; and the said company, its successors and as-

signs *are hereby authorized and empowered to change the line of its railroad so as to reach the eastern boundary line of the state of California by such route as the company shall determine to be the most practicable*, and to file new and amendatory articles of association, and the right, power and privileges hereby granted to, conferred upon, and vested in them, to construct, maintain, and operate, by steam or other power, the said railroad and telegraph line mentioned in said act of Congress, *hereby confirming to and vesting in the said company, its successors and assigns, all the rights, privileges, and franchises, power and authority conferred upon, granted to, or vested in said company by the said acts of Congress and any act of Congress which may be hereafter enacted.*"

JOINT RESOLUTION OF JUNE 28, 1870.

(16 Stat. L., 382.)

"*Be it resolved by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the Southern Pacific Rail oad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven, and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said

act of July twenty-seventh, eighteen hundred and sixty-six, *expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act.*"

TEXAS PACIFIC AND SOUTHERN PACIFIC ACT.

March 3, 1871 (6 Stat. L., 573, 579).

"AN ACT To incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes."

Sections 1 to 22 of this act incorporated and made a grant of lands to the Texas Pacific Railroad Company.

Section 23 provides as follows:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: *Provided, however*, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company or any other railroad company."

ACT OF FORFEITURE.

Act of July 6, 1886 (24 Stat. L., 123).

AN ACT To forfeit the lands granted to the Atlantic and Pacific Railroad Company, etc.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all the lands, excepting the right of way, and the right, power and authority given to said corporation to take from the public land adjacent to the line of said road material of earth, stone, timber, and so forth, for the construction thereof, including all necessary grounds for station buildings, workshops, depots,

machine shops, switches, side tracks, turntables, and water stations, heretofore granted to the Atlantic and Pacific Railroad Company by an act of Congress entitled 'An act granting lands to aid in the construction of railroad and telegraph lines from the states of Missouri and Arkansas to the Pacific Coast,' approved July twenty-seventh, eighteen hundred and sixty-six, and subsequent acts and joint resolutions of Congress which are adjacent to and coterminous with the uncompleted portions of the main line of said road, embraced within both the granted and the indemnity limits, as contemplated to be constructed under and by the provisions of said act of July twenty-seventh, eighteen hundred and sixty-six, and acts and joint resolutions subsequent thereto and relating to the construction of said road and telegraph line be, and the same are hereby, declared forfeited and restored to the public domain."

ACT OF CONGRESS OF MARCH 3, 1887.

Chapter 376 of second session 49th Congress.

(24 Stats., 556.)

AN ACT To provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That the Secretary of the Interior be, and is hereby, authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

"SEC. 2. That if it shall appear, upon the completion of such adjustments respectfully, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented by the United States, to or for the use or benefit of any company claiming by, through or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or re-conveyance to the United

States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so re-convey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States.

"SEC. 3. That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: *Provided*, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: *And provided also*, That he did not voluntarily abandon said original entry: *And provided further*, That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon.

"SEC. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants, respectively, shall have been adjusted; and

patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting. And the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the Government price of similar lands. And in case of neglect or refusal of such company to make payments as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the said amount: *Provided*, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified or patented as aforesaid from recovering the purchase money therefor from the grantee company, less the amount paid to the United States by such company as by this act required:

And provided, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

"SEC 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therfor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section what at the date of such sales were in the

bo[illegible]e occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therfor. *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

"SEC. 7. That no more lands shall be certified or conveyed to any state, or to any corporation or individual, for the benefit of either of the companies herein mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such state, corporation, or individual would be rightfully entitled."

Approved March 3, 1887. (24 Stat., 556.)

ACT OF CONGRESS, FEBRUARY 12, 1896.

(29 Stat., 6.)

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section four of an act entitled 'An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes,' approved March third, eighteen hundred and eighty-seven, be, and the same is hereby, amended by adding thereto the following proviso: '*Provided further*, That where such purchasers, their heirs or assigns, have paid only a portion of the purchase price to the company, which is less than the Government price of similar lands, they shall be required, before the delivery of patent for their lands, to pay to the Government a sum equal to the difference between the portion of the pur-

chase price so paid and the Government price, and in such case the amount demanded from the company shall be the amount paid to it by such purchaser.'"

ACT OF CONGRESS OF MARCH 2, 1896.

(29 Stat., 42.)

"*Be it enacted, &c.*, That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress, and amendments thereto, is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: *Provided*, That no suit shall be brought or maintained, nor shall recovery be had for lands, or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

"SEC. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons, for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one

claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons, for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject matter, or at his option as prescribed in sections three and four of chapter three hundred and seventy-six of the acts of the second session of the Forty-ninth Congress.

"SEC. 3. That if at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted, and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land, as hereinbefore specified.

Appendix (2).

Extracts from the Petition for Rehearing by Southern Pacific Company in Supreme Court (168 U. S., 1). Denied Dec. 20, 1897.

"Supreme Court of the United States.

OCTOBER TERM, 1897.

"No. 71.

"THE SOUTHERN PACIFIC RAILROAD COMPANY AND OTHERS, APPELLANTS,

"*vs.*

"THE UNITED STATES, APPELLEE.

"APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

"PETITION FOR RE-HEARING AS TO CERTAIN PORTIONS OF THE LANDS INVOLVED IN THE SUIT.

"To the Honorable the Justices of the Supreme Court of the United States:

"The appellants in the above entitled cause hereby humbly pray that the said case may be re-heard, and a re-argument therein ordered, *as to certain classes of land involved in the suit*, which are hereinafter specifically referred to, and that decrees be rendered in respect to such respective classes of lands as hereinafter prayed respectively." * * * * * * *

"The causes reported in 146 U. S. involved, however, only the claim of the Southern Pacific Railroad Company to lands which were situated within the *granted limits* of its *Branch Line Grant;* the causes reported at pages 570–614 involving lands in the *granted* limits of

the Southern Pacific Branch Line Grant which were found to be within the *granted limits of the Atlantic & Pacific Grant;* and the causes reported at pages 615–619 involving lands also within the *granted* limits of the Southern Pacific Branch Line Grant, but which were found within the *indemnity limits of the Atlantic & Pacific Grant.*"

"The lands involved in the causes reported at pages (146 U. S.) 570–614, being included within the *granted* limits of both grants, were held to belong to the United States on account of the priority of the date of the Atlantic and Pacific Grant of 1866 over the Southern Pacific Branch Line Grant of 1871, upon the principle that in respect to such a conflict priority of grant controlled. The lands involved in the causes reported (146 U. S.) at pages 615–619, being included within the *granted* limits of the Southern Pacific Grant and the indemnity limits of the Atlantic and Pacific Grant, were held to belong to the United States on account of the *proviso* quoted above, which provided that the Branch Line Grant should not 'affect or impair the rights present or *prospective* of the Atlantic and Pacific Railroad Company or any other railroad company.'"

"These former causes, upon the adjudication and authority of which the present case has been decided, did not however, involve lands in any of the three following categories:

"A. Lands within the *indemnity limits* of the Southern Pacific Branch Line Grant of 1871; the right to select and acquire which is dependent upon the *status* of the lands, not at the date of the grant or definite location (as in the case in respect of lands within *granted* limits), but at the date of *selection.*

"B. Lands claimed under the Southern Pacific Main Line Grant, viz., under Section 18 of the Atlantic and Pacific act of 1866.

"C. Lands sold by the Southern Pacific Railroad Company before institution of suit, and the rights of purchasers thereof (1) as bona fide purchasers under general principles of law; (2) under the act of March 3, 1887; (3) under the act of March 2, 1896."

"*In respect to lands involved within the three categories above referred to there was, and could be, no adjudication in any of the cases reported in 146 U. S., as none of those cases involved lands within those categories or either of them, nor do any principles established in either of those cases determine the questions involved in the determination of the rights of the company to these lands.*" * * * * * * * * * *

* * * * * * * * * * *

"The Grounds of this Application."

"*First.* The court has erroneously, but as is believed inadvertently, affirmed the decrees of the courts below affecting the right of the Southern Pacific Railroad Company, *subsequently to the passage of the Atlantic and Pacific forfeiture act of July 6, 1886*, to select under the act of March 3, 1871, as indemnity for losses occurring in its granted limits under said act, the lands involved in this cause which are within Southern Pacific *indemnity limits;* and accordingly it is respectfully submitted that the decree of the Circuit Court of Appeals, so far as it affirms the decree of the Circuit Court in respect to the lands involved in this suit within the *indemnity* limits of the Southern Pacific Railroad Company under the act of March 3, 1871, should be reversed by this court, and that the Circuit Court should be directed to dismiss the bill as respects those lands"

"*Second.* The final decrees, in this cause, should be so modified as to be expressed therein to be *without prejudice* to any right, title or interest of the Southern Pacific Railroad Company *under and by virtue of the Main Line Grant to that* company, contained in the act of July 27, 1866, in or to any of the lands described in the bill and in the decree of the Circuit Court." *

* * * * * * * * * *

"First."

"AS TO THE LANDS EMBRACED WITHIN THE *INDEMNITY LIMITS* OF THE SOUTHERN PACIFIC *BRANCH LINE GRANT*, AND THE

RIGHT OF THE SOUTHERN PACIFIC RAILROAD COMPANY TO MAKE INDEMNITY SELECTIONS THEREIN *AFTER* THE FORFEITURE OF THE ATLANTIC AND PACIFIC GRANT AND THE RESTORATION TO THE PUBLIC DOMAIN OF THE LANDS INCLUDED THEREIN."

I.

"*The decree of the Circuit Court of July 19, 1894, adjudged that the United States 'is the owner, by title in fee simple absolute of all the sections of lands' therein described*, which are the identical lands described in the bill, and that '*the defendants are, and each of them is, forever enjoined and restrained from* chopping upon or carrying from the said lands any trees, timber or wood, and from *claiming or asserting any right, title or interest in or to the said lands or any thereof.*' [record, vol. 1, pp. 356, 357.]"

"The Circuit Court of Appeals, on June 24, 1895, simply affirmed the decree of the Circuit Court (ib, vol. 5, p. 3214)."

"By the opinion of this court, filed on the 18th of October last, the decree of the court below is 'affirmed in all respects as to the *Southern Pacific Railroad Company*, as well as to the trustees in the mortgage executed by that company, and affirmed also as to the other defendants, subject, however, to the right of the Government to proceed in the Circuit Court to a final decree as to those defendants.'"

* * * * * * * * *

"The present cause was decided, and the decrees below were affirmed, as we understand from the opinion of the court, as upon the authority of the decisions in the former cases of *The United States vs. Southern Pacific Railroad Company* (146 U. S., 570), *and the United States vs. Colton Marble and Lime Company*, and *United States vs. Southern Pacific Railroad Company* (146 U. S, 615)."

"Those cases, however, involved only certain lands

within the *common granted or primary limits* of the Southern Pacific and the Atlantic & Pacific Companies, and certain lands within the *granted or primary limits of the Southern Pacific*, which fell within the former *indemnity* limits of the *Atlantic and Pacific*, and did not involve or relate to any lands within the *indemnity* limits of the *Southern Pacific;* and the decrees in those cases, therefore, did not and could not conclude or affect, as authority or precedent, any issues or questions of law touching the right of selection of the Southern Pacific Railroad Company under the act of 1871, after the passage of the Atlantic and Pacific Forfeiture Act of 1886, in respect to the lands within the *Southern Pacific indemnity limits*, and the Atlantic and Pacific granted limits, or within the common *indemnity* limits of both grants."

* * * * * * *

"In view, however of the broad terms of the decree of the Circuit Court, and the apparent legal effect of the decree, if affirmed, with regard to such of the lands here in suit as are within the indemnity limits of the Southern Pacific and the former Atlantic & Pacific granted or indemnity limits, and with regard to the existing and future selections thereof by the Southern Pacific Company under the act of 1871, it is necessary that the appellants should respectfully ask, as they do, that the learned court will order a re-hearing herein, and that the decree of the Circuit Court of Appeals, affirming the decree of the Circuit Court so far as it affects such Southern Pacific indemnity lands, be reversed, and that the Circuit Court be directed to dismiss the bill as respects those lands."

* * * * * * * * *

"It will appear upon an examination of this diagram (map 33) and the decree of the Circuit Court that, of the lands described in the bill of the United States and the decree of the Circuit Court, some 99,004.85 acres, as estimated, are within the *Southern Pacific indemnity limits* and the former Atlantic and Pacific granted and indemnity limits."

* * * * * * * *

"Second."

"AS TO THE CLAIM OF THE SOUTHERN PACIFIC RAILROAD COMPANY, AND THE MORTGAGE TRUSTEES, IN RESPECT TO LANDS EMBRACED WITHIN ITS *MAIN LINE GRANT* UNDER THE 18TH SECTION OF THE ATLANTIC AND PACIFIC ACT OF 1866."

* * * * * * * *

"*As a matter of fact considerable amounts of land embraced within the limits of the Main Line Grant are included within the land for the recovery of which by the United States this suit was brought.*" * * *

* * * * * * * *

"The bill in this cause refers to the Atlantic and Pacific Act of 1866, as prescribing the extent of the grant to the Atlantic and Pacific Railroad Company, through and by means of which the lands involved were claimed to have been withheld from the Southern Pacific grant, and also for the purpose of indicating the terms and conditions upon which the Southern Pacific Branch Line Grant (which for that purpose adopted the terms of the Atlantic and Pacific Grant) was made, but it did not make nor indicate any attack upon the Southern Pacific *Main Line* Grant. The answer interposed in this cause (for the reason stated above) made no claim under the Main Line Grant to any of the lands involved in this suit."

"In fact, the bill of the United States was so framed and to *tender issue only* upon the claim of the defendants under the act of 1871, as it expressly alleged in paragraph V, 'that said defendants claim said lands *under and by virtue of said* act of March 3, 1871,' etc. [record, vol. 1, p. 35], and paragraph V of the answer *admits* that the defendants claim ownership in themselves and grantees, etc., under the act of March 3, 1871 [record, vol. 1, p. 103]."

"The evidence in the cause was taken upon the same theory [vol. 1, p. 444]. As we have said, the fact that these lands were included within the Main Line

Grant, as well as within the Branch Line Grant, wholly escaped the attention of the pleader and of counsel for the defendants until the cause was being reached for argument in the Circuit Court of Appeals, when an examination by new counsel, then retained in the suit, of the maps in volume 6, paged as to 19 and 33, showed that the limit-lines of the Main Line Grant covered some of the lands in suit."

"It might undoubtedly be said that inasmuch as suit was brought for the recovery of these lands, it was incumbent upon the defendants to assert all the titles or claims which they had thereto, and that if, in addition to their claim to these lands under the Branch Line Grant (which this court has held to have been adjudicated against them by the decision of the former causes), they had a valid title thereto under the Main Line Grant, they should have asserted that valid title in their answer to the suit. We should not perhaps dispute this proposition, and this Maine Line title would of course have been asserted if its existence had been observed. But the Main Line lands being assumed to be free from challenge, and the Branch Line lands having been already challenged in the former litigations, the minds of the pleader and of counsel were directed solely to the controversy as to the Branch Line title, and the fact that these lands were included within the Main Line Grant remained unobserved by them until new counsel prepared the cause for argument in the Circuit Court of Appeals."

"If this were a suit at law in ejectment or the like, the failure to assert and put in issue the Main Line title might have been incurably fatal to any right or claim of the defendants thereunder."

"We do not understand, however, that this rule applies to equity causes; where it is perfectly competent for the court, in the exercise of a wise discretion, to protect the rights of parties by an adjudication upon the issues involved in the cause, made and expressed to be made without prejudice to any other claim not put in issue therein."

* * * * * * * * * * * *

"Third.)"

"AS TO LANDS SOLD BY THE SOUTHERN PACIFIC RAILROAD COMPANY BEFORE INSTITUTION OF SUIT AND THE RIGHTS OF PURCHASERS THEREOF (1) AS BONA FIDE PURCHASERS UNDER GENERAL PRINCIPLES OF LAW, (2) UNDER THE ACT OF MARCH 3 1887, (3) UNDER THE ACT OF MARCH 2, 1896.

"This subject is dealt with under the Tenth, Eleventh and Twelfth Points (pages 330 to 352) of the original brief of the appellants in this court."

* * * * * * * * *

"The decree in the Circuit Court adjudged primarily and as to all the defendants in the case that the United States is the owner by title in fee simple absolute of all the lands described in the bill, and thereupon enjoined the defendants and each of them 'from chopping upon or carrying from the said lands any trees, timber or wood, and *from claiming or asserting* any right, title or interest in or to the said lands or any thereof.' "

"These paragraphs of the decree would, of course, cut off and determine adversely to the *purchasers* any right, title or interest on their part in respect to said lands or any part thereof."

* * * * * * * * *

"However, as pointed out in the Twelfth Point of the original brief (pages 336 to 352), there intervened, between the passage of this decree in the Circuit Court and the argument of the appeal in this court, the act of Congress of March 2, 1896, quoted on pages 337 to 340 of that brief, which proceeded upon an entirely different theory, to wit, that 'no *patent* to any lands held by a bona fide purchaser shall be *vacated* or annulled, but the *right and title of such purchaser is hereby confirmed*' —that is to say, that instead of canceling the old patent and creating a new title, as was contemplated under the act of 1887, the act of 1896 protected the old patent against cancellation or annullment, and the purchasers' right and title thereunder was confirmed. And

in view of the provisions of this act of 1896, it was submitted on behalf of those purchasers that 'the decree of the court below in this suit should under any circumstances be reversed and the cause should be remanded to the Circuit Court with directions to that court to ascertain and determine which of the patented lands in controversy are held by bona fide purchasers within the meaning of that act, and to except such lands from the operation of any decree otherwise vacating or annulling any such patent.'"

"It is needless to repeat here the argument upon that subject contained in the Twelfth Point of the original brief, and we have but little to add to the suggestion contained therein."

* * * * * * * * *

"The appellants therefore pray that the said case may be reheard and a re-argument therein ordered, upon some day by the Court to be appointed, *as to the three classes of lands* involved in the suit herein above referred to, and that decrees be rendered in respect to such respective classes of lands as hereinbefore respectfully prayed."

"JOSEPH H. CHOATE,
J. HUBLEY ASHTON,
CHARLES H. TWEED,
of Counsel for Appellants."

Appendix (3).

Table of Dates.

Showing chronologically dates of grants, filing of maps, and other important acts.

Dec. 2, 1865.....Articles of incorporation of Southern Pacific Railroad Company filed in California, for a railroad "from some point on the Bay of San Francisco, in the state of California, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San

Diego,to the town of San Diego, thence eastward through the said county of San Diego to the eastern line of of the state of California. (record 526.)

July 27, 1866....Act of Congress granting lands to Atlantic and Pacific Company from Springfield, Mo., to the Pacific ocean, and authorizing the Southern Pacific to make connection at state of California's boundary.

Nov. 23, 1866...Acceptance of this act by A. & P. R. Co. (record 641–643.)

Jan. 3, 1867.....Southern Pacific Railroad map of general route from San Francisco via Mojave to Colorado river at Needles, filed. (record 1400.)

Mar. 19, 1867.. Secrerary of Interior Browning orders withdrawal of lands on Southern Pacific general route map of 1867, *within thirty-mile limits, reserving future consideration as to conflict with other railroad routes.* (record 1273, 1274.)

July 14, 1868...Secretary of Interior Browning rejects Southern Pacific map of 1867 as being upon unauthorized route, and orders lands restored. (record 1275–1280.)

Aug. 20, 1868...Secretary of Interior suspends previous order of July 14, 1868. (record 1281, 1282.)

Nov. 2, 1869.....Secretary of Interior Cox vacates previous order of suspension of August 20, 1868, and rejects map of 1867, and orders lands restored. (record 921–923.)

Nov. 11, 1869...Secretary Cox upon reconsideration, confirms previous order of November 2, 1869, rejecting map and restoring lands. (record 889–892.)

Dec. 15, 1869...Secretary Cox suspends orders of November 2nd and 11th preceding, in view solely of pending Congressional legislation. (record 1289, 1290.)

Feb. 21, 1870...Secretary Cox rejects and refuses to approve a section of Southern Pacific Railroad constructed on map of 1867, as being unauthorized. (record 1283, 1284.)

April 4, 1870...California Legislature passed act authorizing Southern Pacific Railroad to connect with transcontinental railroad from the east at the *eastern boundary* of California, and to change its route and amend articles and accept additional grants from Congress.

June 28, 1870...Congress passed joint resolution authorizing Southern Pacific Railroad to construct upon the route as near as may be, shown by map of 1867 (from San Francisco via Mojave to Colorado river at Needles), and to receive patents to lands upon same terms, etc., as granted by act of July 27, 1866, "expressly saving and reserving the rights of actual settlers, *together with the other conditions and restrictions provided for in the 3rd section of said act.*"

March 3, 1871...Act of Congress granting lands to Southern Pacific Company and Texas Pacific Company, and authorizing the Southern Pacific Company to construct its road from Tehachapi Pass, via Los Angeles, to the Colorado river at Fort Yuma.

April 3, 1871 ..Southern Pacific map of general route from Mojave, via Los Angles, to Yuma filed. (record 872.) And orders of withdrawal. (record 927, 928.)

March 8, 1872 Atlantic & Pacific maps from Springfield, Mo., to Colorado river, filed in Interior Department. (record 2615.)

March 9, 1872 Atlantic & Pacific map of definite location of section from range 7 east, S. B. M., to west line of Los Angeles

County, filed in Interior Department. (For this map see plffs. ex. 14, not printed.) Filed and approved by Secretary April 11, 1872 (plffs. ex. 23, record 619, 622). Approved by Commissioner and lands withdrawn in 30-mile limits April 22, 1872. (Plffs. ex. 25, record 623, 624.) Withdrawal map. (record 874, 875, 876.)

Aug. 15, 1872....Atlantic and Pacific maps of definite location, covering sections (1) from Colorado river to range 7 east, S. B. M., (2) from west line of Los Angeles County to Pacific Ocean at Ventura, filed in Interior Department. (For these maps, see plffs. ex. 13, not printed.) Filed August 15, 1872. (record 626.) Approved by Secretary April 16, 1874. (plffs. ex. 26, record 626.) Lands withdrawn in 30 mile limits Nov. 23, 1874. (plffs ex 42, 43, record 877, 879.) Withdrawal maps. (record 868, 896, 924.)

May 9, 1873.....Secretary Delano decides that the joint resolution of June 28, 1870, made a new grant to the Southern Pacific Railroad upon a line of route not before authorized, and that lands reserved or disposed of prior to June 28, 1870, were not subject to grant. (record 1301–1305.)

May 11, 1874....*First section* Southern Pacific (branch) road as definitely located and constructed from San Fernando *via* Los Angeles to Spadra, filed in Interior Department. (Not printed.) Definite withdrawal within 20 and 30-mile limits, May 11, 1874. (For order and map of withdrawal, see record 1207–1210.) This section was accepted by United States May 9, 1874. (record 1415.)

Nov. 15, 1875....*Second section* Southern Pacific (branch)

road as definitely located and constructed from Spadra to range 1 west, filed in Interior Department. (Not printed.) Definite withdrawal within 20 and 30-mile limits December 20, 1875. (For order and map of withdrawal, see record 1210–1214.)

July 24, 1876 ... *Third section* Southern Pacific (branch) as definitely located and constructed from range 1 west to range 7 east, filed in Interior Department. (Not printed.) Definite withdrawal within 20 and 30-mile limits Aug. 19, 1876. (For order and map of withdrawal see record 1216–1220.)

March 6 1877.... *Fourth section* Southern Pacific (branch) as definitely located and constructed from San Fernando to Mojave, filed in Interior Department. (For map see defts. ex. 47 a; rec. 1476, 1477.) Definite withdrawal within 20 and 30-mile limits Mar. 27, 1877. (For order and map of withdrawal, see record 1220–1224.)

Jan. 31, 1878... *Fifth section* Southern Pacific (branch) as definitely located and constructed from range 7 east to Colorado river at Yuma, filed in Interior Department. (Not printed.)

Jan. 7, 1885 .... Sectional maps filed in Interior Department, showing Southern Pacific Railroad from Mojave to Colorado river at Needles, as constructed and located by authority of joint resolution of Congress, June 28, 1870. (record 1158, 1159. See also map not printed, plff's ex. 291 to 296 inclusive, sent up as original documents.)

July 6, 1886..... Act of Congress forfeiting Atlantic and Pacific Railroad grant, and restoring lands to public domain.

March 3, 1887....Act of Congress providing for adjustment of railroad land grants and protection of *bona fide* purchasers from railroad, of lands excepted from the grant.

June 7, 1887.....Decision of Secretary of Interior promulgated to the effect that grant to Atlantic and Pacific Railroad, in California, was not operated upon by Southern Pacific grant of 1871, and that the lands were restored to public domain. (5 L. D., 691; 6 id., 816; 6 id., 679; 6 id., 812.)

Nov. 22, 1889...Amended bill of complaint filed by United States in United States Circuit Court, Southern District of California, against Southern Pacific Railroad Company (defendants being then in court), alleging grant made to Atlantic and Pacific Railroad Company, definite location of road and forfeiture to United States of grant, and restoration to public domain by act of July 6, 1886. (record 644, 684.) Answer filed Dec. 30, 1889 (record 684–708.)

Nov. 12, 1892...Decision of above case of United States vs Southern Pacific Railroad Company by United States Supreme Court (146 U. S., 570–615–619), adjudging that Atlantic and Pacific Railroad Company received a valid grant from Congress, had definitely located its entire route, and that its entire grant in California had been forfeited and restored to the public domain free from any title or claim of the Southern Pacific Railroad Company. (record 825, 819)

May 14, 1894...This bill was filed by the United States against Southern Pacific Railroad Company, *et al.* (record 8330.)

Process served July 23, 1894. (record 40–41.)

Feb. 12, 1896....Act of Congress amending act of March 3, 1887, and providing for payment to Government by purchasers of difference in price paid to railroad on executory contracts for patented land and Government price.

March 2, 1896....Act of Congress confirming titles of *bona fide* purchasers from railroad of patented lands, and amending act of March 3, 1887.

Appendix (4).

Table of Land Sales.

Lands as to which the Circuit Court dismissed the bill, showing date of contracts of sale made by Southern Pacific, name of purchaser, contract price, amount paid, number of acres, and date of patent.

Explanations. (1) All of these lands were sold by executory contracts and were unpatented when contracted to be sold (except as to the 48th and 114th sales, which sales were made in 1895 *pendente lite*), and each contract contains a provision to the effect that the railroad has not secured title or patent for the land, and that if it fails to do so the contract shall be void and the company will refund the money paid. [record 2052, 2549, 2552.] (2) This table follows in its order that part of the decree dismissing the bill as to these lands. (3) The payments made on these lands were prior to filing supplemental answer, viz., on June 6, 1898 (rec. 200). (4) All the lands were patented *pendente lite.* [record 2563, 2576, 2585]. (5) Patented lands were sold by the railroad upon one form of contract, and those *unpatented* upon another. [rec. 2052, 2549.] The production of original contracts was waived. [rec. 2088.] (6) The facts concerning these sales, names

of purchasers, dates, price and contracts to sell are shown by Exhibit "A" to the verified supplemental answer. [rec. 202-206.] The lands now in question are shown by the latter part of the exhibit, commencing with contract No. 11206. [rec. 272-310.]

(1) September 21, 1892; W. M. and M. C. Bailey; contract price $400.00, paid $205.62; 321.29 acres; patented November 28, 1894. [rec. 272.]

(2) September, 21, 1892; W. M. and M. C. Bailey; contract price $400.00, paid $204.80; 320 acres; patented November 28, 1894. [rec. 272.]

(3) November 7, 1885; John C. Quinn; contract price $399.00, paid $244.05; 119.60 acres; patented December 22, 1894.

(4) November 7, 1885; Robert Hellman; contract price $397.00, paid $190.55; 158.80 acres; patented December 22, 1894.

(5) November 7, 1885; H. J. Goethe; contract price $400.00, paid $81.60; 40 acres; patented December 22, 1894.

(6) November 7, 1885; J. C. Quinn and H. J. Goethe, contract price $400.00, paid $192.00; 160 acres; patented December 22, 1894.

(7) December 3, 1885; Daniel Kalin; contract price $399.42, paid $236.40; 159.77 acres; patented December 22, 1894.

(8) December 3, 1885; James McCaw; contract price $399.12, paid $236.27; 159.65 acres; patented December 22, 1894.

(9) January 12, 1886; Fred W. Wilson; contract price ———; deed issued May 27, 1895; paid $512.00; 160 acres; patented December 22, 1894.

(10) March 16, 1886; A. J. Pommer; contract price $400.00, paid $512.00; 160 acres; patented December 22, 1894.

(11) December 9, 1885; Bernard Norton; contract price $401.40, paid $108.90; 80.56 acres; patented December 22, 1894.

(12) November 21, 1885; George H. Appell; contract price $402.20, paid $164.96; 80.88 acres; patented December 22, 1894.

(13) December 1, 1885; Wallace A. Briggs; contract price $1600.00, paid $1754.98; 560 acres; patented December 22, 1894.

(14) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $480.00, paid $153.76; 160 acres; patented November 28, 1894.

(15) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $480.00, paid $153.76; 160 acres; patented November 28, 1894.

(16) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $480.00, paid $153.76; 160 acres; patented November 28, 1894.

(17) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $480.00, paid $153.76; 160 acres; patented November 28, 1894.

(18) June 30, 1887. Geo. L. Arnold and C. M. Wells; contract price $640.00, paid $199.68; 160 acres; patented November 28, 1894.

(19) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $640.00, paid $199.68; 160 acres; patented November 28, 1894.

(20) June 30 1887; Geo. L. Arnold and C. M. Wells; contract price $800.00, paid $839.34; 160 acres; patented November 28, 1894.

(21) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $800.00, paid $839.34; 160 acres; patented November 28, 1894.

(22) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $800.00, paid $249.60; 160 acres; patented November 28, 1894.

(23) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $800.00, paid $249.60; 160 acres; patented November 28, 1894.

(24) June 30, 1887; Geo L. Arnold and C. M. Wells; contract price $800.00, paid $249.60; 160 acres; patented November 28, 1894.

(25) June 30, 1887; Geo L. Arnold and C. M. Wells; contract price $800.00, paid $249.60; 160 acres; patented November 28, 1894.

(26) May 31, 1887; John B. Young; contract price $1,920.00, paid $599.04; 640 acres; patented November 28, 1894.

(27) September 28, 1887; Geo. L. Arnold and C. M. Wells; contract price $480.00, paid $230.40; 160 acres; patented November 28, 1894.

(28) September 28, 1887; Geo. L. Arnold and C. M. Wells; contract price $640.00, paid $307.20; 160 acres; patented November 28, 1894.

(29) September 28, 1887; Geo. L. Arnold and C. M. Wells; contract price $640.00, paid $230.40; 120 acres; patented Nov. 28, 1894.

(30) April 21, 1885; M. L. Wicks; contract price $1600.00, paid $499.20; 640 acres; patented November 28, 1894.

(31) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $480.00, paid $122.88; 160 acres; patented November 28, 1894.

(32) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $480.00, paid $122.88: 160 acres; patented Nov. 28, 1894.

(33) May 24, 1884; Edward F. Beale; contraet price $296.00, paid $394.26; 296 acres; patented November 28, 1894.

(34) May 24, 1884; Edward F. Beale; contract price $8 25, paid $1:.08; 8.25 acres; patented November 28, 1894.

(35) May 24, 1884; Edward F. Beale; contract price $458.49, paid $610.71; 458.49 acres; patented November 28, 1894.

(36) May 24, 1884; Edward F. Beale; contract price $640.48, paid $853.12; 640.48 acres; patented November 28, 1894.

(37) May 24, 1884; Edward F. Beale; contract price $640.00, paid $852.44; 640 acres; patented November 28, 1894.

(38) May 24, 1884; Edward F. Beale; contract price $375.04, paid $499.52; 375.04 acres; patented November 28, 1894.

(39) January 18, 1894; Joseph B. Lippincott; contract price $493.20, paid $181.50; 98.64 acres; patented November 28, 1894.

(40) April 11, 1892; Geo. E. Lyman; contract price $400.00, paid $169.60; 160 acres; patented November 28, 1894.

(41) April 11, 1892; George R. Lyman; contract price $400.00, paid $169.60; 160 acres; patented November 28, 1894.

(42) April 11, 1892; George R. Lyman; contract price $400.00, paid $169.60; 160 acres; patented November 28, 1894.

(43) April 11, 1892; George R. Lyman; contract price $400.00, paid $169.60; 160 acres; patented November 28, 1894.

(44) April 12, 1895; Mrs. Elizabeth Schleismayer; contract price $960.00, paid $245.76; 120 acres; patented November 28, 1894.

(45) January 25, 1892; W. M. and M. C. Bailey; contract price $1360.00, paid $307.20; 320 acres; patented November 28, 1894.

(46) May 13, 1892; W. M. and M. C. Bailey; contract price $400.00, paid $102.40; 160 acres; patented November 28, 1894.

(47.) January 25, 1892; W. M. and M. C. Bailey; contract price $2720.00, paid $739.28; 640 acres; patented November 28, 1894.

(48) December 11, 1885; Charles Schwartz; contract price $1430.10, paid $1589.66; 572.04 acres; patented July 10, 1894.

(49) November 10, 1886; J. D. Frederickson; contract price $400.00, paid $73 60; 80 acres; patented July 10, 1894.

(50) March 24, 1885; Martin Kastler; contract price $1600, paid $528.00; 440 acres; patented July 10, 1894.

(51) March 31, 1885; Simon S. Nash; contract price $1628.45, paid $1055.21; 651.38 acres; patented July 10, 1894.

(52) March 31, 1885; Lewis E. Hillen; contract price $1639.35, paid $277.58; 171.01 acres: patented July 10, 1894.

(53) December 8, 1885; Benjamin Steinauer; contract price 795.00, paid $470.64; 318 acres; patented July 10, 1894.

(54) December 8. 1885; Rudolph J. Smith; contract price $400.00, paid 483.47; 160 acres; patented July 10, 1994.

(55) December 8, 1885; Xavier Schunrizer; contract price $398.05, paid $235.64; 159.22 acres; patented July 10, 1894.

(56) May 9, 1885; Kenneth McK. Ham; contract price $800, paid $518.40; 320 acres; patented July 10, 1894.

(57) June 15, 1885; J. L. Pavkovich; contract price $800, paid $339.20; 320 acres; patented July 10, 1894.

(58) May 5, 1885; George E. Bates; contract price $1600, paid $1516; 640 acres; patented July 10, 1894.

(59) April 16, 1885; Frank F. Freeman; contract price 1600, paid $1036.80; 640 acres; patented July 10, 1894.

(60) May 12, 1885; R. McD. Scriver; contract price $800, paid $339.20; 320 acres; patented July 10, 1894.

(61) November 21, 1885; John C. Quinn; contract price $800, paid $339.20; 320 acres; patented July 10, 1894.

(62) November 21, 1885; H. J. Goethe; contract price $800, paid 339.20; 320 acres; patented July 10, 1894.

(63) November 21, 1885; Thomas Norton; contract price $800, paid $249.60; 320 acres; patented July 10, 1894.

(64) November 25, 1885; James McCaw; deed issued November 21, 1894; paid $588.75; 156.59 acres; patented July 10, 1894.

(65) November 25, 1885; Rupert M. Meller; contract price $386.72, paid $185 60; 154.69 acres; patented July 10, 1894.

(66) December 3, 1885; John Lyndenmayer; contract price $800, paid $1051.10; 320 acres; patented July 10, 1894.

(67) December 3, 1885; John C. Quinn; contract price $800, paid $737.70; 320 acres; patented July 10, 1894.

(68) December 1, 1885; Wallace S. Briggs; deed issued September 18, 1894; paid $2,005.70; 640 acres; patented July 10, 1894.

(69) June 1, 1888; William Sexton: contract price

$400, paid $102.40; 160 acres; patented July 10, 1894.

(70) June 1, 1888; William Sexton; contract price $400, paid $102.40; 160 acres; patented July 10, 1894.

(71) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $400.00, paid $124.80; 160 acres; patented July 10, 1894.

(72) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $400.00, paid $124.80; 160 acres; patented July 10, 1894.

(73) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $400.00, paid $124.80; 160 acres; patented July 10, 1894.

(74) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $395.80, paid $123.48; 158.32 acres; patented July 10, 1894.

(75) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $400.00, paid $124.80; 160 acres; patented July 10, 1894.

(76) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $393.80, paid $122.86; 157.25 acres; patented July 10, 1894.

(77) July 11, 1887; Martin Seigel; deed issued January 10, 1896; paid 471.05; 160 acres; patented July 10, 1894.

(78) July 11, 1887; Martin Seigel; deed issued January 10, 1896; paid $471.05; 160 acres; patented July 10, 1894.

(79) July 9, 1887; Julia H. Pinkert; contract price $800.00, paid $473.60; 320 acres; patented July 10, 1894.

(80) July 9, 1887, Julius H. Pinkert; contract price $800.00, paid $473.60; 320 acres; patented July 10, 1894.

(81) June 28, 1887; Benjamin F. Smith; contract price $400 00, paid $236.80; 160 acres; patented July 10, 1894.

(82) June 28, 1887; Benjamin F. Smith; contract price $400.00, paid $214.40; 160 acres; patented July 10, 1894.

(83) April 11, 1887; Benjamin F. Nutting; deed issued May 3, 1885; paid $580.45; 160 acres; patented July 10, 1894.

(84) April 11, 1887; G. C. Mitchell; contract price $400.00, paid $214.40; 160 acres; patented July 10, 1894.

(85) July 9, 1887; N. G. Seibel; deed issued January 10, 1896; paid $1179.95; 320 acres; patented July 10, 1894.

(86) July 9, 1887; N. G. Seibel; contract price $800.00, paid $893.93: 240 acres; patented July 10, 1894.

(87) July 16, 1887; Judge W. Dayan; contract price $400 00, paid $236.80; 160 acres; patened July 10, 1894.

(88) July 9, 1887; N. G. Seibel; contract price $800.00, paid $118.40; 80 acres; patented July 10, 1894.

(89) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $160.00, paid $49.92; 160 acres; patented July 10, 1894.

(90) June 30, 1887; Geo. M. Arnold and C. M. Wells; contract price $160.00, paid $49.92; 160 acres; patented July 10, 1804.

(91) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $160.00, paid $49.92; 160 acres; patented July 10, 1894.

(92) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $160.00, paid $49.92; 160 acres; patented July 10, 1894.

(93) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $400.00, paid $124.80; 160 acres; patented November 28, 1894.

(94) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $405.50, paid $126.20; 161.80 acres; patented November 28, 1894.

(95) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $400.00, paid $124.80; 160 acres; patented November 28, 1894.

(96) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $403.55, paid $125.91; 161.42 acres; patented November 28, 1894.

(97) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $240.00, paid $74.88; 160 acres; patented November 28, 1894.

(98) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $240.00, paid $74.88; 160 acres; patented November 28, 1894.

(99) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $240.00, paid $74.88; 160 acres; patented November 28, 1894.

(100) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $240.00, paid $74.88; 160 acres; patented November 28, 1894.

(101) June 6, 1888; Elizabeth A. Beck; deed issued October 9, 1895; paid $1091.68; 320 acres; patented July 10, 1894.

(102) May 21, 1888; Myra Parish; contract price $400.00, paid $31.10; 40 acres; patened July 10, 1894.

(103) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $200.00, paid $62.40; 160 acres; patented July 27, 1895; November 22, 1894.

(104) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $200.00, paid $62.40; 160 acres; patented November 28, 1894.

(105) June 30, 1887; Geo. M. Arnold and C. M. Wells; contract price $200.00, paid $62.40; 160 acres; patented (Main line) July 27, 1895; (Branch line) November 28, 1894.

(106) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $200.00, paid $62.40; 160 acres; patented November 28, 1894.

(107) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $160.00, paid $49.92; 160 acres; patented November 28, 1894.

(108) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $160.00, paid $49.92; 160 acres; patented November 28, 1894.

(109) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $160.00; paid $49.92; 160 acres; patented November 28, 1894.

(110) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $160.00, paid $49.92; 160 acres; patented November 28, 1894.

(111) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $400.00, paid $124.80; 160 acres; patented November 28, 1894.

(112) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $400.00, paid $124.80; 160 acres; patented November 28, 1894.

(113) February 10, 1888; Isaac H. Bell; contract price $400.00;, paid $393 20; 160 acres; patented November 28, 1894.

(114) William Hillabolt; deed issued May 20, 1895. paid $562.40; 160 acres; patented November 28, 1894.

(115) November 12, 1887; G. L. Denison; contract price $480.00, paid $430.92; 160 acres; patented November 28, 1894.

(116) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $481.44; paid $150.20; 160.48 acres; patented November 28, 1894.

(117) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $240.00, paid $74.88; 160 acres; patented November 28, 1894.

(118) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $240.00, paid $74.88; 160 acres; patented November 28, 1894.

(119) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $240.00, paid 74.88; 160 acres; patented November 28, 1894.

(120) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $240, paid $74.88; 160 acres; patented November, 28, 1894.

(121) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $240, paid $74.88; 160 acres; patented November 28, 1894.

(122) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $240, paid; $74.88; 160 acres; patented November 28, 1894.

(123) June 30, 1887; Geo. L. Arnold and C. M. Wells; contract price $240, paid $74.88; 160 acres; patented November 28, 1894.

(124) June 30. 1887; Geo. L. Arnold and C. M. Wells; contract price $240, paid $74.88; 160 acres; patented November 28, 1894.

(125) May 24, 1884; Edward F. Beale; contract price $136, paid $181.17; 136 acres; patented November 28, 1894.

18. 24.

No. 152 and 185.

Stat. Brf. of Call for U. S.

Filed, Jan. 22, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Nos. 152, 185.

SOUTHERN PACIFIC RAILROAD COMPANY et al., appellants, v. THE UNITED STATES, APPELLEE. } No. 152.

THE UNITED STATES, APPELLANT, v. SOUTHERN PACIFIC RAILROAD COMPANY et al., appellees. } No. 185.

APPEAL AND CROSS APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

ADDITIONAL BRIEF FOR UNITED STATES.

JOSEPH H. CALL,
Special United States Attorney.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Nos. 152, 185.

SOUTHERN PACIFIC RAILROAD COMPANY et al., appellants, *v.* THE UNITED STATES, APPELLEE.	No. 152.
THE UNITED STATES, APPELLANT, *v.* SOUTHERN PACIFIC RAILROAD COMPANY et al., appellees.	No. 185.

APPEAL AND CROSS APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

ADDITIONAL BRIEF FOR UNITED STATES.

FIRST.

THAT LANDS WITHIN THE INDEMNITY LIMITS AS WELL AS THE GRANTED LIMITS OF THE ATLANTIC AND PACIFIC RAILROAD IN CALIFORNIA APPERTAIN TO THE GRANT TO THAT COMPANY, AND WERE THEREFORE EXCLUDED FROM THE GRANT TO THE SOUTHERN PACIFIC RAILROAD, HAS BEEN FINALLY AND CONCLUSIVELY ADJUDGED IN THE FORMER LITIGATIONS BETWEEN THE UNITED STATES AND THE SOUTHERN PACIFIC RAILROAD.

It is understood that in the recent case of *Hewitt* v. *Schultz*, decided January 7, 1901, it was held under section 6 of the grant to the Northern Pacific Railroad Company, which is in all respects similar to section 6 of the grant to the Atlantic and Pacific and Southern Pacific railroads, that there was no authority in the Secretary of the Interior to withdraw the indemnity lands as against *preemption* and *homestead* entries, so as to cut off or impair a preemption entry made after filing map of general route and of definite location, but whatever was intended to be ruled in that case, it is obvious for several reasons that it has no application to the present suit.

If it was finally adjudged in the former litigations between the Government and the Southern Pacific that *indemnity lands* of the Atlantic and Pacific Railroad Company were lands *pertaining* to the Atlantic and Pacific grant, that they were forfeited to the public domain by the act of Congress of 1886 without the Southern Pacific Railroad having acquired any interest in those lands, it can not be very important what was ruled in *Hewitt* v. *Schultz*.

In the case of the *United States* v. *Southern Pacific Railroad* (146 U. S., 615, 619) the record of which case is in evidence in the present suit (pp. 644, 684, 713, 819), the lands the subject of that suit were within the indemnity limits of the grant to the Atlantic and Pacific Railroad Company, and it was adjudged by the court that the lands within such indemnity limits, as well as those within the granted limits, covered by

the preceding case (146 U. S., 570), were not operated upon or taken by the Southern Pacific Company; and the court said (pp. 617, 618):

> It might well be assumed that very likely the Atlantic and Pacific Company might be called upon to select from indemnity lands a portion to make good the deficiency in the granted limits. That the right of selection was a prospective right, and if it was to be fully exercised no adverse title could be created to any lands within the indemnity limits. * * * That prospective right would be impaired by the transfer of the title of a single tract to the Southern Pacific. Hence it follows that the title to none of these indemnity lands passed or could pass to the Southern Pacific Company.

The later case of *Southern Pacific* v. *United States* (168 U. S., 1, 66) also involved lands within the *indemnity limits*, as well as granted limits, of the Atlantic and Pacific grant claimed by the Southern Pacific not only under its grant of March 3, 1871, but under its grant by section 18 of the act of July 27, 1866, and the joint resolution of Congress of June 28, 1870, and of the classes of lands involved in that cause the court said that among others were included—

> lands within the granted limits of the Southern Pacific grant and the *indemnity* limits of the Atlantic and Pacific grant; lands within the Southern Pacific *indemnity* limits and the Atlantic and Pacific granted limits; lands within the *common indemnity* limits of both grants (p. 47).

And in that case the court, after stating what the

issues were in the former suits, and what the claims and contentions of the respective parties were, stated (at pp. 61, 62) as follows:

> For the reasons stated, we are of the opinion that it must be taken in this case to have been conclusively adjudicated in the former cases as between the United States and the Southern Pacific Railroad Company—
>
> 1. That the maps filed by the Atlantic and Pacific Railroad Company in 1872 were sufficient, as maps of definite location, to identify the lands granted to that company by the act of 1866.
>
> 2. That upon the acceptance of those maps by the Land Department, the rights of that company in the land so granted, attached, by relation, as of the date of the act of 1866; and
>
> 3. That in view of the conditions attached to the grant, and the reservations of power in Congress contained in the act of 1866, such lands became, upon the passage of the forfeiture act of 1886, the property of the United States, and by force of that act were restored to the public domain, *without the Southern Pacific Railroad having acquired any interest therein that affected the power of the United States to forfeit and restore them to the public domain.*
>
> These grounds being accepted as the basis of our decision, the law in the present case is clearly for the United States; *for, as all the lands here in controversy are embraced by the maps of 1872, and, therefore, appertain to the line located by such maps*, it must be, for the reasons stated in the former decision, that the United

> States is entitled, as between it and the Southern Pacific Railroad Company, to the relief given by the decree below.

It appears, therefore, to have been finally and conclusively determined in the language of the court that the Atlantic and Pacific indemnity lands, as well as the others—

> are embraced by the maps of 1872, and therefore appertain to the line located by such maps.

The Southern Pacific Railroad, and the trustees in the mortgage of 1875, were parties to the former litigations and, as has already been shown on the brief for the Government, the Central Trust Company, trustee for the mortgage of 1888, is in privity with the Southern Pacific Company and was represented by it in the former suits.

With this recent final and conclusive determination against the claim of the Southern Pacific to the Atlantic and Pacific indemnity lands it may not be profitable to speculate upon what decision would be rendered if the matter were reargued as a new question.

But it was proven to the satisfaction of the court and determined in the former suits, and is established in this suit, that all of the indemnity lands of the Atlantic and Pacific Railroad Company were insufficient in quantity to supply the losses within the granted limits of the grant to that company.

In the case 146 U. S., 615, the court said, at page 616:

> The ordinary rule with respect to lands within the indemnity limits is that no title passes

> until selection. *Where, as here, the deficiency within the granted limits is so great that all the indemnity lands will not make good the losses*, it has been held in a contest between two railroad companies that no formal selection was necessary to give them to the one having the older grant as against the other company. (*St. Paul and Pacific Railroad* v. *Northern Pacific Railroad*, 139 U. S., 1.)
>
> And if the Atlantic and Pacific Railroad Company had constructed its road it would be difficult in the light of that decision to avoid the conclusion that all the lands within the indemnity limits passed to that company.

The evidence and admissions in the pleadings in that case established the fact found that the whole quantity of the indemnity lands was insufficient to supply the losses in the granted limits, and that fact further appears in the present case in the report of the Commissioner of the General Land Office for the year 1875, in which the Commissioner, from information compiled in his office, estimates that there will be a total loss in the grant to the Atlantic and Pacific Railroad Company of 2,000,000 acres. (Record, 1225.)

The limitation in the Southern Pacific grants (section 3 of the act of July 27, 1866) was doubtless also a controlling factor in the prior cases, adjudging that none of the lands either granted or indemnity could pass to the Southern Pacific. That provision is:

> That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been hereto-

> fore granted by the United States, so far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act.

The *deduction* was of the total *amount* granted to the former from the total *amount* granted to the latter. Bearing in mind that the Atlantic and Pacific was the *older grant* and *first located*, and that the routes are upon the "*same general line*" between Mojave and the Colorado River, and also upon the Southern Pacific branch line through the Soledad Pass between Mojave and Los Angeles, and the conclusion seems irresistible that all the Atlantic and Pacific lands were deducted from the Southern Pacific grants. The significance of this proviso is commented upon by the circuit court of appeals. (Record, 2661, 2662.)

SECOND.

IT IS SETTLED AS A MATTER OF LAW THAT THE INDEMNITY LANDS OF THE ATLANTIC AND PACIFIC RAILROAD APPERTAIN TO THE GRANT TO THAT COMPANY, AND WERE NOT OPERATED UPON BY ANY GRANT TO THE SOUTHERN PACIFIC COMPANY.

Aside from the effect of the decisions in the former cases as *res adjudicata* the several decisions of the court in the former suits ought to be taken as finally determining the rights of the Government to the Atlantic and Pacific lands as a question of law finally settled. (*United States* v. *Southern Pacific Railroad Company*, 146 U. S., 570, 615, 619; *Southern Pacific Railroad Company* v. *United States*, 168 U. S., 1, 66.)

THIRD.

INDEPENDENTLY OF THE DECISIONS IN THE FORMER SUITS AS EITHER RES ADJUDICATA OR AS PRECEDENTS IN THE PRESENT SUIT, THE ATLANTIC AND PACIFIC INDEMNITY LANDS, SET APART AND RESERVED IN 1872, CAN NOT BE TAKEN BY THE SOUTHERN PACIFIC UNDER ITS GRANTS OF 1871 OR 1870.

If, under the ruling in *Hewitt* v. *Schultz*, there was no requirement in section 6 of the grant to the Northern Pacific Railroad Company, or section 6 in the grant to the Atlantic and Pacific Railroad Company, for the withdrawal of the indemnity lands as against homestead and preemption entries, and even if there was no authority to withdraw them as against such entries there certainly was no prohibition against their being withdrawn as against their appropriation under *subsequent railroad grants* or as against any other mode of acquiring them.

Section 6 of the Northern Pacific and Atlantic and Pacific acts provided only that the lands not granted to the company were to be subject to preemption rights and homestead settlement, and it was for that reason that the contention was made so earnestly in the Interior Department that indemnity lands could not be withdrawn from homestead or preemption entry.

In the present case the Atlantic and Pacific indemnity lands are not only insufficient to supply the losses within the primary limits, but these indemnity lands were withdrawn and set apart in 1872 upon the filing of the map of definite location of the Atlantic and Pa-

cific Railroad, and at that time they were not only reserved from homestead and preemption entries, but they were also reserved from all other modes of "*location*" or "*entry*," which reservation remained unrevoked when the present suit was commenced. (Record 624, 878.)

Upon filing the two Atlantic and Pacific maps, which were filed on March 9, 1872, the Commissioner, in his order of April 22 of the same year, said in his directions to the officers of the local land office:

> You are hereby directed to withhold from preemption or homestead entry, *private sale*, or *location* all the odd-numbered sections falling within those limits (thirty-mile limits), both surveyed and unsurveyed.

And in his order to the same officers, November 23, 1874, upon the remaining two maps in California, filed by the Atlantic and Pacific Railroad Company on August 15, 1872, the Commissioner said:

> You will accordingly withhold from *sale* or *entry* all the odd-numbered sections falling within the thirty-mile limits shown on the diagrams.

That this reservation of these lands for the Atlantic and Pacific Railroad Company in 1872 and before the Southern Pacific filed its map of definite location on either its main or branch line, and which reservation was in aid of an *earlier grant* operated to prevent any of those lands from passing to the Southern Pacific, has been considered and fully presented in the brief heretofore filed on behalf of the Government. (See pp. 65-103.)

And the following authorities are relied upon in support of this contention:

Wolcott v. *Des Moines Company*, 5 Wall., 681.

Hamblin v. *Western Land Company*, 147 U. S., 531.

Northern Pacific v. *Musser-Sauntry Co.*, 168 U. S., 604, 610, 611.

Wisconsin Railroad v. *Forsythe*, 159 U. S., 46, 57.

Spencer v. *McDougal*, 159 U. S, 62.

Chicago Railroad v. *United States*, 159 U. S., 372, 375.

Finally the entire *quantity* of lands in the Atlantic and Pacific grant was to be *deducted* from the Southern Pacific grant so far as the routes are on the same general line, which description covers the lands involved in the present case.

Submitted.

JOSEPH H. CALL,
Special United States Attorney.

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